UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 98CV0213H(E)
ALAN W. JUMP,	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 18th day of June, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Alan W. Jump, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Alan W. Jump, was served with Summons and Complaint on May 8, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Alan W. Jump, for the principal amount of $1,183.99, plus accrued interest of $333.63, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the

current legal rate of 5.413 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/LLF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUANITA H. WRIGHT, Plaintiff, vs. CHRISTOPHER ALLEN HOGG, and BRUCE OAKLEY, INC., and LEGION INSURANCE COMPANY Defendant.	)	No. 97-C-698-K

JUDGMENT

This action came on for jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding, and the issue having been duly heard and a verdict having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff Juanita H. Wright recover of the Defendants the sum of 80,000.00, with interest thereon at the rate provided by law.

ORDERED this 17 day of JUNE, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 6-18-98

WILLIAM INGRAM,)
)
Petitioner,)
vs.) No. 98-C-29-K (J)
)
SUSAN MORGAN, Senior)
Federal Prosecutor,)
Respondent.)

FILED
JUN 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On January 12, 1998, Plaintiff filed a petition for writ of mandamus, seeking an order directing Respondent to furnish at government expense copies of the transcripts or recordings of Petitioner's criminal proceedings, all indictments, all search and arrest warrants, all "scientific findings or test results," all written or recorded statements taken in the course of the prosecution's investigation and/or grand jury hearing and indictment, and all exhibits offered, whether received or rejected. By order entered January 29, 1998 (#2),[1] the Court directed Plaintiff to cure several identified deficiencies. Specifically, the Court directed Petitioner to provide sufficient number of copies, summons and USM-285 marshal forms to serve Respondent. Plaintiff was also directed to submit a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a)[2], as amended by the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), or submit the $150.00 filing fee by February 27, 1998. Thereafter, Plaintiff submitted a motion for

[1]Reference is to the docket number assigned to the document as filed in the Court record.

[2]The Tenth Circuit has held that a petition for writ of mandamus is a "civil action" for purposes of *in forma pauperis* determination pursuant to 28 U.S.C. §1915(a). See In re: Washington, 122 F.3d 1345 (10th Cir. 1997).

leave to proceed in forma pauperis, and after review of the motion and the representations contained therein, the Court granted his motion. However, pursuant to 28 U.S.C. §1915(b)(1), the Court directed Plaintiff to pay an initial partial filing fee of $23.00 on or before May 6, 1998. As of the date of this Order, Plaintiff has failed to pay the initial partial filing fee as ordered.

Because Plaintiff has failed to pay the initial partial filing fee or show cause in writing for his failure to do so, the Court finds this mandamus action should be dismissed without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's mandamus action is **dismissed without prejudice** for failure to prosecute.

All pending motions are denied as moot.

SO ORDERED this 16 day of June, 1998.

Terry C. Kern

TERRY C. KERN, Chief Judge
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD GIBBS,
SSN: 442-66-7044,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-464-M

ENTERED ON DOCKET

DATE JUN 18 1998

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 16th day of June, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(12)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD GIBBS,
SSN: 442-66-7044,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,[1]

DEFENDANT.

CASE NO. 97-CV-464-M

ORDER

Plaintiff, Donald Gibbs, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[2] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by

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[1] Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

[2] Plaintiff's October 3, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held March 27, 1996. By decision dated April 16, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 7, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(11)

substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born February 13, 1958 and was 38 years old at the time of the hearing. [R. 25]. He claims to have been unable to work since July 1, 1989 due to nervous disorder, back problems, chest pain and shortness of breath. [R. 31, 44, 73].

The ALJ determined that Plaintiff has impairments consisting of low average IQ of 84 and slight tremor in both hands but that he retains the residual functional capacity (RFC) to perform a full range of light work, subject to limitations imposed by those impairments. [R.16]. He found Plaintiff had no past relevant work (PRW) but determined, based upon the testimony of a vocational expert (VE), that occupations exist in significant numbers in the economy that Plaintiff can perform and found that

Plaintiff was not disabled as defined by the Social Security Act. [R. 16]. The case was thus decided at step 5 of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's decision is not supported by substantial evidence. Specifically, Plaintiff claims the ALJ's RFC determination and credibility findings are not based upon substantial evidence and that the ALJ relied upon the vocational expert's response to an incomplete hypothetical question in reaching his decision. [Plaintiff's Brief, p. 2].

For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff's First Statement of Error

Plaintiff contends that "[t]here is no specific medical evidence in the record supporting [the ALJ's] finding" that he can lift 20 pounds and stand or walk 6 hours out of an 8 hour workday. He states "it was established that [Plaintiff's] condition was disabling due to severe hand tremors, back pain, breathing problems, chest pain and limited mobility." Yet, he points to no medical evidence in the record to support this contention. It is well settled that subjective complaints alone are not sufficient to establish disability. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993). While it is correct that, at step five, the Commissioner bears the burden of proving that Plaintiff retains the RFC to do other work which exists in the national economy, it is

not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993).

In determining the Plaintiff's RFC, the ALJ relied upon a report dictated for the Disability Determination Unit by William R. Grubb, M.D. as well as medical records submitted by Plaintiff after the hearing from a chiropractor and a neurologist. [R. 12]. Dr. Grubb, who examined Plaintiff on October 31, 1994, reported Plaintiff's medical history as given to him and found, upon physical examination, that Plaintiff had normal range of motion with the exception of flexion of the lumbosacral spine of a slight amount given his obesity and body habitus. [R. 93-99]. Dr. Grubb reported Plaintiff's sensory and motor functions were intact, no focal motor or sensory deficits, normal dexterity of gross and fine manipulation and grip strength 5/5 bilaterally. [R. 94-95]. Plaintiff's gait appeared to be without pain or evident asymmetry or lack of balance, adequate in terms of speed, stability and safety with no cogwheeling and taking normal steps with normal balancing movements of his arms. [R. 95]. He noted the presence of a very fine rest tremor affecting both hands but no gross or pill-rolling type of tremor that disappears with activity. *Id.* Samuel H. Park, M.D., a neurologist, who evaluated Plaintiff on September 15, 1995, reported focal dystonia in the left hand intermittently and recommended EMG and nerve conduction studies to rule out significant nerve entrapment. He stated that "[b]ecause of the occasional nature of the dystonia, I do not believe any further invasive management will be necessary from the neurological point of view." He suggested a treatment plan, such as a Botox injection program, "if the dystonia gets more frequent." [R. 117]. Dr. Park also noted

mild tremor in the hands and a lumbar strain with soft tissue injury and recommended physical treatment at the lumbar level. *Id.* A handwritten note from Plaintiff's chiropractor dated October 12, 1995, stated Plaintiff had received care for a back condition and under remarks: "No lifting, stooping, bending, twisting, reaching, climbing or sitting for extended periods." Notes from the OSU Health Care Center, dated November 9, 1995 indicate that lab test results, including a chest x-ray and EKG, appeared within normal limits. [R. 131, 134, 137]. Treatment notes from the UMA Internal Medicine Clinic, dated July 3, 1996, indicate Plaintiff was seen for chest pain which was thought to be esophageal in nature. [R. 142]. Plaintiff did not report for the scheduled barium swallow test on July 9, 1996. [R. 141, 145].

Contrary to Plaintiff's contention, this is not a case in which the ALJ relied upon "the absence of evidence" to reach his decision. See *Thompson v. Sullivan,* 987 F.2d 1482, 1491 (10th Cir. 1993). The ALJ described the evidence in the record upon which he based his conclusion that Plaintiff could perform work at the light exertional level with the limitations set forth in his findings. This evidence included all the medical evidence and Plaintiff's testimony. The ALJ was entitled to consider that Plaintiff had not sought medical treatment for the problems he asserted caused his disability and that Plaintiff was taking no medication for the pain he alleged rendered him disabled. See *Kepler v. Chater,* 68 F.3d 387, 391 (10th Cir. 1995) (factors to be considered by ALJ in assessing credibility include extensiveness of attempts (medical or nonmedical) to obtain relief and frequency of medical contacts). The ALJ explained his reasons for discounting Plaintiff's pain allegations, including the objective medical

evidence, lack of medication for severe pain, infrequency of medical treatment, his prior work record, his daily activities and his demeanor at the hearing. The ALJ appropriately discussed in detail the evidence that led him to believe Plaintiff's condition is not as severe as he alleged. To the extent Plaintiff seeks to challenge the weight the ALJ gave to the evidence, his argument must fail. The Court will not reweigh the evidence. *Casias v. Secretary of Health & Human Servs.,* 933 F.2d 799, 800 (10th Cir. 1991). It is for the Commissioner to decide what weight to accord various medical reports. *Johnson v. Bowen*, 864 F.2d 340 (5th Cir. 1988), (declining to reweigh the evidence to determine which of two conflicting examiners' reports to accept). The Commissioner, not the courts, has the duty to weigh the evidence, resolve material conflicts in the evidence and decide the case, *Johnson, id.*, (citing *Chaparro v. Bowen*, 815 F.2d 1008 (5th Cir. 1987)). See also *Brown v. Bowen*, 801 F.2d, 361 (10th Cir. 1986) and *Ellison v. Sullivan*, 929 F.2d 534 (10th Cir. 1990).

The Court finds Plaintiff's first allegation of error without merit.

Plaintiff's Second Statement of Error

Plaintiff contends the ALJ failed to include all his true limitations in the question he posed to the vocational expert witness (VE), rendering his reliance upon the testimony of the VE improper. This argument is also without merit.

In posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the

disability determination is based, are supported by substantial evidence. The Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

Conclusion

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to perform a full range of light work subject to a low average IQ of 84 and a slight tremor in both hands. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 16th day of June, 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JUDY DeSELM, d/b/a PRECISION CUT,

Plaintiff,

vs.

PRECISION CUTS, INC., a corporation, and R. LEE ROGERS,

Defendants.

Case No. 98-CV-233-BU(E)

ORDER

On March 25, 1998, Defendants, Precision Cuts, Inc., and R. Lee Rogers, removed the above-captioned case to this Court from the District Court for Tulsa County, State of Oklahoma. In the Notice of Removal, Defendants asserted that this Court had jurisdiction over Plaintiff's claims and Defendants' counterclaims pursuant to 28 U.S.C. § 1331.

This matter now comes before the Court upon the motion of Plaintiff, Judy DeSelm, d/b/a Precision Cut, to remand this action to the District Court for Tulsa County. Plaintiff contends that she has only alleged state law claims (libel, slander and business interference) in her Petition. She claims that her allegations concerning the nullity of Defendants' trademark is consistent with state law. In addition, Plaintiff asserts that the controversy between the parties only involves a trademark filed with the Oklahoma Secretary of State. Since there are no allegations

regarding the nullity of a federal registered trademark and no relief sought under the Lanham Act, 15 U.S.C. § 1051, et seq. Plaintiff maintains that her action does not arise under federal law, and therefore, the Court lacks subject matter jurisdiction over this action.

Defendants, in response, contend that Plaintiff has pleaded facts and asserted allegations sufficient to support a trademark infringement claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Defendants assert that § 43(a) does not require federal registration of a trademark. Defendants contends that § 43(a) also applies to non-registered trademarks. In addition, Defendants contend that Plaintiff has alleged a claim for trade libel under § 43(a). According to Defendants, Plaintiff has artfully pleaded her Petition to couch her federal claims in terms of state law. Because Plaintiff's claims regarding the subject trademark are in actuality federal claims, Defendants contend that removal was proper. Defendants further contend that the Court has jurisdiction over this action by virtue of their compulsory counterclaim brought under § 43(a) of the Lanham Act.

In reply, Plaintiff contends that she has not stated a federal cause of action in her Petition. Plaintiff asserts that she has only pleaded facts entitling her to relief under Oklahoma law. Plaintiff states that the punitive damages she requests are not available under the Lanham Act. Plaintiff further asserts that

Defendants' counterclaim premised upon the Lanham Act does not vest the Court with jurisdiction.

A defendant may remove an action to federal court only if the district court has "original jurisdiction" over the action. 28 U.S.C. § 1441(a). If the federal court lacks diversity jurisdiction over the lawsuit, the defendant must establish that the action "arises under" the Constitution or laws of the United States in order to remove the case from state court to federal court. 28 U.S.C. § 1331. In deciding whether a suit arises under federal law, the court is guided by the "well-pleaded complaint" rule, under which a suit arises under federal law "only when the plaintiff's statement of [her] own cause of action shows that it is based" on federal law. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). The plaintiff's anticipation of a defense based on federal law is not enough to make the case "arise under" federal law. Id. Nor is a defendant's assertion of a federal defense, such as the federal preemption of the state law on which plaintiff's claim is based, a proper basis for removal. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). This is true even if both parties that the only issue for decision in a case is the validity of a federal preemption defense. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983). The plaintiff is master of the complaint and may avoid federal jurisdiction by relying exclusively on state law.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

Plaintiff's Petition, on its face, only alleges state law claims. Although the Petition sets forth facts which might be cast as a violation of either state or federal law, Plaintiff, as master of her complaint, has chosen to rely upon state law. Based upon the face of Plaintiff's Petition, the Court lacks subject matter jurisdiction over this action.

The analysis, however, does not end with the examination of Plaintiff's Petition on its face. Under the "artful pleading" doctrine, a plaintiff may not defeat removal by failing to plead federal questions that are essential elements of the plaintiff's claim. Franchise Tax Bd., 463 U.S. at 22. Similarly, removal is permitted when the plaintiff's right to relief requires resolution of a substantial question of federal law. Id. at 13.

The "complete preemption" doctrine has been referred to as a corollary, Caterpillar, 482 U.S. at 393, or an exception, Oklahoma ex rel. Oklahoma Tax Comm'n v. Wyandotte Tribe, 919 F.2d 1449, 1450 (10th Cir. 1990), cert. denied, 501 U.S. 1219 (1991), to the well-leaded complaint rule. When the doctrine is properly invoked, a complaint alleging only a state law cause of action may be removed to federal court on the theory that federal preemption makes the state law claim "necessarily federal in character." Metropolitan Life, 481 U.S. at 63-64.

In the removal context, the complete preemption doctrine has

been applied primarily in two situations-claims alleging a breach of a collective bargaining agreement under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), Avco Corp v. Aero Lodge No. 735, 390 U.S. 557 (1968), and for claims of benefits or enforcement of rights under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(1)(B), Metropolitan Life, 481 U.S. at 63-67. However, it has also been applied to actions for possession of Native American tribal lands and actions under the Railway Labor Act. 16 Moore's Federal Practice, § 107.14(4)(b)(3d ed. 1998).

Defendants, in their response brief, have not cited to any cases where the courts have held that the Lanham Act completely preempts state law. Cases which have addressed the issue have found otherwise. La Chemise Lacoste v. Alligator Co., Inc., 506 F.2d 339 (3d Cir. 1974), cert. denied, 421 U.S. 937 (1975); Gateway 2000, Inc. v. Cyrix Corp., 942 F. Supp. 985 (D. N.J. 1996); Passalacqua Corp. v. Restaurant Management II, Inc., 885 F. Supp. 154 (E.D. Mich. 1995). Based upon these authorities, the Court finds that the "complete preemption" doctrine is inapplicable to this case and that the "well-pleaded complaint" rule controls.

As to Defendants' contention that the Court may exercise removal jurisdiction by virtue of their federal counterclaim, the Court finds such contention to be without merit. A defendant may only remove a state action on the basis of claims brought against them and not on the basis of counterclaims asserted by them. 14A

Wright, Miller, & Cooper, Federal Practice and Procedure, § 3731 (2d ed. 1985); 16 Moore's Federal Practice, § 107.14(3)(a)(vi) (3d ed. 1998). Therefore, the Court finds that Defendants' counterclaim may not support removal of Plaintiff's action.

In conclusion, Plaintiff has chosen to litigate this matter under state law and to forego whatever claims might exist under federal law. The Court is bound to respect Plaintiff's well-pleaded complaint. Because the Court lacks subject matter jurisdiction over Plaintiff's Petition, the Court finds that remand is required under 28 U.S.C. § 1447(c).

Accordingly, Plaintiff's Motion to Remand (Docket Entry #3) is GRANTED. The Clerk of the Court is DIRECTED to effect the remand of this action to the District Court for Tulsa County, State of Oklahoma.

Entered this 17th day of June, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

CWK/cac

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE WILLOWS CONDOMINIUMS OWNERS ASSOCIATION, INC.,

Defendant,

vs.

UNITED STATES OF AMERICA on behalf of THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., His Successors and Assigns,

Plaintiff.

Case No. 98 CV 0203B (J)

ENTERED ON DOCKET
DATE 6-17-98

NOTICE OF STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure 41(a)(1)(ii), it is hereby stipulated by the parties hereto, The Willows Condominiums Owners Association, Inc., and The United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by and through their appointed attorneys, that the above entitled action be dismissed, with prejudice, for all claims the Plaintiff may have against the Defendant as of the date of the filing of this Dismissal, each party to be responsible for its own costs and attorney fees incurred herein.

DATED this 11th day of June, 1998.

LAYON, CRONIN, CLARK & KAISER, P.L.L.C.

By: _____

Curtis W. Kaiser OBA # 4856
Pratt Tower - 6th Floor
125 West 15th Street
Tulsa, Oklahoma 74119-3821
(918) 583-5538

DATED this 11th day of June, 1998.

Phil Pinnell OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74137
(918) 581-7670

F:\USERS\CWK\WILLOWS\NOTICE.DIS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DELMER AND BARBARA ENGLES,

Plaintiffs,

v.

Case No. 98-CV-0179-K (E)

THOMAS M. MADDEN CO. AN ILLINOIS CORPORATION;

AMERICAN INTERNATIONAL COMPANIES, A NEW YORK CORPORATION LICENSED TO DO BUSINESS IN THE STATE OF OKLAHOMA;

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH IS LICENSED TO DO BUSINESS IN THE STATE OF OKLAHOMA;

THE LAW FIRM OF RHODES, HIERONMYUS, JONES, TUCKER, AND GABLE OF TULSA, OKLAHOMA;

DISTRICT JUDGE DEBORAH SHALLCROSS TULSA COUNTY COURTHOUSE,

Defendants.

REPORT AND RECOMMENDATION

At issue before the Court are (1) Defendant Shallcross' Motion to Dismiss (Docket # 2) and Defendants' Motion to Dismiss (Docket # 3). Having reviewed the briefs, it is hereby recommended that the motions be **GRANTED**.

I. BACKGROUND

The circumstances of this case date back to 1990 when plaintiffs filed a lawsuit against Thomas M. Madden Co., Atlas Utility Co., and Dykon, Inc. in Tulsa County District Court for damages caused in the course of certain blasting operations incidental to construction of the Tupelo Creek flood control pond. The 1990 state court suit was dismissed. Plaintiffs filed a second suit in Tulsa County District Court on January 30, 1995 against Thomas M. Madden Co., Atlas Utility Co., Dykon, Inc., and Clayton Harold Collingsworth. The 1995 state court suit, presided over by Deborah Shallcross, District Judge of the Fourteenth Judicial District of the State of Oklahoma, ended in mistrial. Plaintiffs have now brought suit in United States District Court, naming Thomas M. Madden Co. ("Madden"), American International Companies ("AIC"), National Union Fire Insurance Co. ("National Insurance"), Rhodes, Hieronymus, Jones, Tucker, & Gable, P.L.L.C. ("Rhodes, Hieronymus"), and Judge Shallcross as defendants. Plaintiffs, who appear *pro se*, allege that "federal and state constitutional laws" were violated by, in general, the defendants delaying plaintiff's suit from coming to trial and, in particular, Judge Shallcross ordering a mistrial in the 1995 state court suit. Plaintiff's Petition and Request for Emergency Trial (Docket #1), at 2. Plaintiffs do not name any specific statute as having been violated, but make general reference to the Due Process Clause of the U.S. Constitution.

II. REVIEW

Plaintiffs allege that their federal and constitutional rights have been violated, making reference to the guarantee of Due Process in the U.S. Constitution. Such an allegation would fall under 42 U.S.C. § 1983, which forbids the deprivation of rights, privileges, or immunities secured by the U.S. Constitution and laws by persons acting under color of state law.

The courts of the United States are courts of limited jurisdiction. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). In the present case, there is no complete diversity of citizenship. Therefore, in order for this Court to have jurisdiction to hear plaintiffs' claim, plaintiffs must establish that the subject matter of the claim presents a federal question pursuant to 28 U.S.C. § 1331.[1] Defendants contend that plaintiffs' action must be dismissed for lack of subject matter jurisdiction and failure to state a claim.

The United States Supreme Court's decision of Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946) is instructive here, where the challenge to the Court's jurisdiction is also a challenge to the existence of a federal cause of action. In Bell, the court stated:

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Bell, 327 U.S. at 682-683, 66 S. Ct. at 776 (citations omitted). Thus, where a determination of subject matter jurisdiction is intertwined with a determination of the merits, a federal claim which is not insubstantial, frivolous, or made solely for the purpose of obtaining jurisdiction requires the

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[1] Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Court to recognize jurisdiction and proceed to a determination of whether plaintiff has stated a cause of action on which relief could be granted. The undersigned, in accord with Bell, assumes jurisdiction and proceeds to a recommendation of whether plaintiffs have stated an actionable federal claim.

In considering the sufficiency of the claim, the undersigned follows the familiar rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). Plaintiffs allege that Judge Shallcross' actions in regard to plaintiffs' 1995 state court suit, over which Judge Shallcross presided, violated plaintiffs' constitutional rights. Judge Shallcross, however, is absolutely immune from liability in this case.

The doctrine of judicial immunity is well-established. See Harlow v. Fitzgerald, 457 U.S. 800, 807, 102 S. Ct. 2727, 2732, 73 L. Ed. 2d 396 (1982). Judicial immunity applies to actions brought pursuant to Section 1983. "[J]udges enjoy absolute immunity from liability under [Section] 1983--even when the judge allegedly conspires with private parties." Hunt v. Bennett, 17 F.3d 1263, 1267 (10th Cir.), cert. denied, 513 U.S. 832, 115 S Ct. 107, 130 L. Ed. 2d 55 (1994). See also Dennis v. Sparks, 449 U.S. 24, 27, 101 S. Ct. 183, 186, 66 L. Ed. 2d 185 (1980); Stump v. Sparkman, 435 U.S. 349, 356, 98 S. Ct. 1099, 1104-1105, 55 L. Ed. 2d 331 (1978); Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967); Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986) ("[I]t is well settled that the doctrine of judicial immunity is applicable in actions . . . that are brought pursuant to [Section] 1983").

The principal value of judicial immunity is not the protection of individual judges, but the benefit to the public, "whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." Pierson, 386 U.S. at 554, 87 S. Ct. at 1218. The Tenth Circuit has set forth the following standards for determining whether judicial immunity applies to a particular action:

> The appropriate inquiry in determining whether a particular judge is immune is whether the challenged action was "judicial," and whether at the time the challenged action was taken, the judge had subject matter jurisdiction. See Stump, 435 U.S. at 356, 98 S. Ct. at 1104-05. Stated differently, judges are liable only when they act in "clear absence of all jurisdiction"; they are absolutely immune even when their action is erroneous, malicious, or in excess of their judicial authority. Id. at 356-57, 98 S. Ct. at 1104-05.

Van Sickle, 791 F.2d at 1435.

The undersigned finds that Judge Shallcross' actions in regard to plaintiffs' 1995 state court suit, including the order of mistrial and any alleged delay, were judicial acts in a case within her jurisdiction. Accordingly, the doctrine of judicial immunity shields Judge Shallcross from any possible liability in this case, and the undersigned recommends that the case against her be dismissed.

Nor do plaintiffs state a valid claim against any of the remaining defendants. As stated above, plaintiffs' allegations most closely resemble a claim brought pursuant to Section 1983. To have an actionable claim under Section 1983, a plaintiff must establish (1) that the actions complained of were made by a person acting under color of state law, and (2) that such actions

deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.[2] Davis v. Odin, 886 F. Supp. 804, 808-809 (D. Kan. 1995).

There is no factual contention in plaintiffs' complaint that in any way supports a finding that Madden, AIC, National Insurance, or Rhodes, Hieronymus are state actors or acted under color of state law.[3] From what may be learned from the complaint, Madden is the private contractor which ran the construction operation that allegedly damaged plaintiffs, AIC and National Insurance are private insurance companies which were involved in the state court litigation by virtue of a contract to insure Madden, and Rhodes, Hieronymus is the law firm which represented the insurance companies in the state court litigation. The actions of Madden, AIC, and National Insurance in the state court suit cannot be said to have been under color of state law. See Taylor v. Nichols, 558 F.2d 561, 564 (10th Cir. 1977). Nor were the actions of Rhodes, Hieronymus in representing Madden, AIC, and National Insurance in the state court litigation under color of state law. See Phillips v. Gisher, 445 F. Supp. 552, 554 (D. Kan. 1977) ("[A]ttorneys who participate in state court litigation

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2 A claim of conspiracy under 42 U.S.C. § 1985 requires that defendants have conspired for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws. Section 1985 does not specifically require that a defendant have acted under color of state law. However, Section 1985 does require that a defendant's action be motivated by some class-based, invidiously discriminatory animus. See Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L. Ed. 2d 338 (1971); Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). To the extent plaintiff's claim is brought under Section 1985, the claim fails because plaintiffs' complaint in no way alleges any class-based discriminatory animus.

3 While Fed. R. Civ. P. 8 eliminated the requirement of detailed fact pleading, the rule still demands that a complaint be of sufficient detail that it "give[s] the defendant[s] fair notice of what [plaintiffs'] claim is and the grounds upon which it rests." Conley, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957). Here, the complaint presented by plaintiffs may very well run afoul of this latter requirement; but, in light of plaintiffs' *pro se* status, the undersigned has construed the complaint as liberally as possible in order to rule on the facts and law that would have been implicated by a better pled complaint.

do not act under color of law.") The undersigned recommends a finding that plaintiffs' complaint fails to state a claim upon which relief may be granted and, therefore, must be dismissed in accord with Fed. R. Civ. P. 12(b)(6).

III. CONCLUSION

Upon careful review of the complaint and subsequent briefs, for the foregoing reasons, the undersigned recommends that Defendant Shallcross' Motion to Dismiss (Docket # 2) and Defendants' Motion to Dismiss (Docket # 3) be **GRANTED**.

IV. OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver of right to appeal).

Dated this 16th day of June, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 17 Day of June, 1998.

L Schwebke

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIE & MARILYN GILBERT, as parents and next friend of their minor daughter, TANYA GILBERT, et al.,

Plaintiffs,

v.

INDEPENDENT SCHOOL DISTRICT NO. 5 OF ROGERS COUNTY, a/k/a INOLA PUBLIC SCHOOLS,

Defendant.

Case No. 97-CV-20-H
CLASS ACTION

JUDGMENT

This matter came before the Court on a motion for attorneys' fees and costs by Plaintiffs. The Court duly considered the issues and rendered a decision in accordance with the order filed on June 12, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiffs and against Defendant for attorneys' fees and costs in the amount of $18,915.41.

IT IS SO ORDERED.

This 12th day of June, 1998.

Syen Erik Holmes
United States District Judge

SPK 6/1/98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 6-16-98

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MICHAEL WADE BORRELL aka Mike Borrell;	)	
SHARON JEAN BORRELL aka Sharon Borrell;	)	
COUNTY TREASURER, Osage County, Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. 95-C-1169-H

FILED

JUN 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12TH day of JUNE, 1998. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; that the Defendants, Michael Wade Borrell aka Mike Borrell and Sharon Jean Borrell aka Sharon Borrell, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant,Michael Wade Borrell aka Mike Borrell, executed a Waiver of Service of Summons on December 14, 1995; that the Defendant, Sharon Jean Borrell aka Sharon Borrell, was served with Summons and Complaint on January 24, 1996 by certified mail, return receipt requested, delivery restricted to the addressee; that the Defendant, County Treasurer, Osage County, Oklahoma, was served with Summons and Complaint on November 29, 1995 by certified mail, return receipt requested, delivery restricted to the addressee; and that the Defendant, Board of County

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Commissioners, Osage County, Oklahoma, was served with Summons and Complaint on November 29, 1995 by certified mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer on December 1, 1995; that the Defendants, Michael Wade Borrell aka Mike Borrell and Sharon Jean Borrell aka Sharon Borrell, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that Michael Wade Borrell is one and the same person as Mike Borrell and that Sharon Jean Borrell is one and the same person as Sharon Borrell.

The Court further finds that on March 2, 1995, Michael Wade Borrell filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-00577-W. On June 26, 1995, a Discharge of Debtor was entered discharging debtor of all dischargeable debts. Subsequently, Case No. 95-00577-W, United States Bankruptcy Court, Northern District of Oklahoma was closed on August 15, 1995.

The Court further finds that on February 20, 1996, Sharon Jean Borrell filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 96-00550-M. On July 2, 1996, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

THAT PART OF THE WEST HALF OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER (W/2 NW/4 SE/4 NE/4) OF SECTION THIRTY-TWO (32), TOWNSHIP TWENTY-ONE (21) NORTH, RANGE TWELVE (12) EAST OF THE INDIAN MERIDIAN, LYING WEST OF COUNTY ROAD, OSAGE COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE U.S. GOVERNMENT SURVEY THEREOF.

The Court further finds that on January 5, 1987 Michael Wade Borrell and Sharon Jean Borrell, executed and delivered to Charles F. Curry Company, their promissory note in the amount of $38,717.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Michael Wade Borrell and Sharon Jean Borrell, husband and wife, executed and delivered to Charles F. Curry Company a mortgage dated January 5, 1987, covering the above-described property. Said mortgage was recorded on January 8, 1987, in Book 0708, Page 274, in the records of Osage County, Oklahoma.

The Court further finds that on January 18, 1991, Charles F. Curry Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on February 1, 1991, in Book 787, Page 24, in the records of Osage County, Oklahoma.

The Court further finds that on February 1, 1991, Michael Wade Borrell and Sharon Jean Borrell entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 1, 1991, June 1, 1992, January 1, 1993, July 1, 1993, January 1, 1994 and August 1, 1994.

The Court further finds that Defendants, Michael Wade Borrell aka Mike Borrell and Sharon Jean Borrell aka Sharon Borrell, made default under the terms of the aforesaid note, mortgage and forbearance agreements by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note, mortgage and forbearance agreements, after full credit for all payments made, the principal sum of $37,573.45, plus penalty charges in the amount of $13.16, less $67.39 applied escrow funds, plus accrued interest in the amount of $6,341.87 as of March 20, 1995, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants,County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have a lien on the property which is the subject matter of this action in the amount of $16.90, plus penalties and fees, by virtue of personal property taxes. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, Michael Wade Borrell aka Mike Borrell and Sharon Jean Borrell aka Sharon Borrell, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against Defendants, Michael Wade Borrell aka

Mike Borrell and Sharon Jean Borrell aka Sharon Borrell, in the principal sum of $37,573.45, plus penalty charges in the amount of $13.16, less $67.39 applied escrow funds, plus accrued interest in the amount of $6,341.87 as of March 20, 1995, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.434 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment in the amount of $16.90, plus penalties and fees, by virtue of personal property taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Michael Wade Borrell aka Mike Borrell and Sharon Jean Borrell aka Sharon Borrell, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Plaintiff;

Third:
In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
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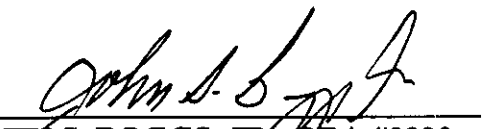
(918) 581-7463



JOHN S. BOGGS, JR., OBA #0920
Assistant District Attorney
Osage County Courthouse
Pawhuska, Oklahoma 74056
(918) 287-1510
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Osage County, Oklahoma

Judgment of Foreclosure
Case No. 95-C-1169-H (Borrell)

LFR:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIE & MARILYN GILBERT, as parents and next friend of their minor daughter, TANYA GILBERT, et al.,

Plaintiffs,

v.

INDEPENDENT SCHOOL DISTRICT NO. 5 OF ROGERS COUNTY, a/k/a INOLA PUBLIC SCHOOLS,

Defendant.

Case No. 97-CV-20-H
CLASS ACTION

ORDER

This matter comes before the Court on Plaintiffs' application for attorneys' fees (Docket # 8). Plaintiffs seek attorneys' fees for Professor Ray Yasser and Mr. Samuel J. Schiller in the amounts of $9,450.00 and $13,350.00, respectively. Plaintiffs further seek costs for Professor Yasser and Mr. Schiller in the amounts of $78.75 and $1,736.66, respectively. Defendant Independent School District No. 5 of Rogers County ("Inola School District") does not dispute that Plaintiffs are entitled to reasonable attorneys' fees and costs, but rather contests the reasonableness of the amounts of fees and costs requested.[1]

The district court has discretion in determining the amount of an attorneys' fee award. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The underlying principle for determining this amount is one of reasonableness. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 562 (1986). The lodestar figure, which is the reasonable number of hours times the reasonable rate, is the "mainstay" of the calculation of a reasonable fee. Anderson v. Secretary of Health and Human Services, 80 F.3d 1500, 1504 (10th Cir. 1996).

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[1] The Court commends both the parties and the attorneys for their cooperation and professionalism in this matter. As in previous cases, the Court has been very impressed by the commitment of both parties and counsel to a productive resolution of this case.

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The plaintiff in an application for attorneys' fees has the burden of proving the reasonableness of each hour in the application, making a good faith effort to exclude hours that are excessive, redundant, or unnecessary. Jane L. v. Bangerter, 61 F.3d 1505, 1510 (10th Cir. 1995). Likewise, the district court must also exclude from the granting of fees hours not "reasonably expended." Malloy v. Monahan, 73 F.3d 1012, 1018 (10th Cir. 1996). The court may also make a general reduction in hours to achieve what the court perceives to be a reasonable award. Carter v. Sedgwick County, 36 F.3d 952, 956 (10th Cir. 1994).

Applying these principles, as well as the reasoning of the court in Randolph, et al. v. Owasso Public Schools, et al., No. 96-C-105-K (N.D. Okla. May 21, 1997) and Bull, et al. v. Tulsa Public Schools, et al., No. 96-C-180-H (N.D. Okla. Sept. 4, 1997), the Court finds that Plaintiffs are entitled to reasonable attorneys' fees in this case. The Court further finds that due to the facts and circumstances of this case a reduction in the lodestar amount is appropriate. Of course, this reduction in no way reflects adversely on the high quality of the legal work in this matter. The Court hereby awards the amount of $7,087.50 for Professor Yasser and the amount of $10,012.50 for Mr. Schiller as reasonable attorneys' fees. In making this determination, the Court awards Mr. Schiller an hourly rate of $150 per hour, based upon his experience in the litigation of similar Title IX cases. The Court also finds that Professor Yasser is entitled to reasonable costs in the amount of $78.75 and that Mr. Schiller is entitled to reasonable costs in the amount of $1,736.66. Thus, the Court hereby awards to Plaintiffs fees in the total amount of $17,100.00 and costs in the total amount of $1,815.41.

IT IS SO ORDERED.

This 12TH day of June, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN LAWMASTER,

Plaintiff,

v.

P. BLAIR WARD AND UNKNOWN AGENTS OF THE UNITED STATES TREASURY DEPARTMENT BUREAU OF ALCOHOL, TOBACCO AND FIREARMS and the UNITED STATES,

Defendants.

Case No. 93-C-1115-H

ORDER

This matter comes before the Court on a Motion to Dismiss or for Summary Judgment by Defendant P. Blair Ward and Defendant Unknown Agents (Docket #51). John Lawmaster commenced this action on December 16, 1993, alleging constitutional violations by unknown agents of the Department of Treasury Bureau of Alcohol, Tobacco, and Firearms. This Court granted Defendants' Motion for Summary Judgment and entered judgment on December 19, 1995. On January 19, 1996, Plaintiff filed his notice of appeal. However, Plaintiff Lawmaster died on July 23, 1997. On August 13, 1997, Defendants suggested the death on the record by filing a Suggestion of Death before the Tenth Circuit. The Tenth Circuit, having no confirmation of death, issued its opinion, reversing the Court's grant of summary judgment as to the unknown agents. Lawmaster v. Ward, 125 F.3d 1341 (10th Cir. 1997). The Court held a status hearing in this matter on January 16, 1998. The Court ordered Defendants to serve a suggestion of death and notice of deadline for substitution of parties on Plaintiff's known heirs. Defendants filed such a notice with the Court on

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January 20, 1998. The Court held a second status hearing on January 30, 1998, in order to determine if additional heirs existed. Plaintiff's attorney, Steven L. Sessinghaus, appeared by telephone at the hearing on January 30, 1998. On February 6, 1998, Defendants filed a status report with the Court, stating that Mr. Sessinghaus had identified no other heirs other than those listed on Defendants' January 20, 1998 Suggestion of Death. Plaintiff's father, Roy Lawmaster, was personally served with the Suggestion of Death on March 1, 1998. On June 3, 1998, Defendants filed a supplemental status report advising the Court that the time within which an heir should have made a motion for substitution now has expired (Docket # 53).

The Court finds that the time within which a party could have filed a motion to substitute has now expired. No motion to substitute has been filed in this matter. Therefore, this action is hereby dismissed.

IT IS SO ORDERED.

This 12TH day of June, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

COUNCIL OAKS LEARNING CAMPUS, INC.,

Plaintiff,

vs.

AETNA CASUALTY & SURETY COMPANY OF AMERICA; THE STANDARD FIRE INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; CAPITOL INDEMNITY CORPORATION,

Defendants.

Case No. 98CV 003C (M)

ENTERED ON DOCKET
DATE JUN 16 1998

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, pursuant to FED. R. CIV. P. 41(a)(1), by and between Federal Insurance Company and Council Oaks Learning Campus, Inc., by and through their undersigned attorneys, that the above-styled action shall be dismissed with prejudice and on the merits as to Federal Insurance Company, but without costs or attorney fees to either of the parties to this Dismissal, and that judgment of dismissal with prejudice and on the merits may be entered hereon without further notice.

Dated: 6/4/98

MARC F. CONLEY, P.C.

By: _____
MARC F. CONLEY, OBA # 1845
Attorney for Plaintiff

STAUFFER, RAINEY, GUDGEL & HATHCOAT, P.C.

By: _____
JANDRA S. JORGENSON, OBA # 16610
Attorneys for Federal Ins. Co.

SO ORDERED, this 15th day of June, 1998

The Honorable H. Dale Cook

(24)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRISTOPHER GORTEMILLER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 96-CV-569-C
	)	
RON WARD, Warden, and the ATTORNEY GENERAL of the STATE OF OKLAHOMA,	)	
	)	
Respondents.	)	

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondents and against Petitioner.

SO ORDERED THIS 15th day of June, 1998.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

(11)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRISTOPHER GORTEMILLER,)
)
Petitioner,)
)
vs.) Case No. 96-CV-569-C
)
RON WARD, Warden, and the)
ATTORNEY GENERAL of the STATE)
OF OKLAHOMA,)
)
Respondents.)

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his sentences entered in Tulsa County District Court, Case No. CF-95-0884. Respondent has filed a Rule 5 response (#4) to which Petitioner has replied (#5). As more fully set out below the Court concludes that this petition should be denied.

BACKGROUND

On April 13, 1995, Petitioner pled guilty to two counts of Sexually Abusing a Minor Child in Tulsa County District Court, Case No. CRF-95-0884, and received a sentence of fourteen (14) years imprisonment on each count to run consecutively. Petitioner did not move to withdraw his guilty plea or otherwise perfect a direct appeal. On January 23, 1996, Petitioner filed an application for post-conviction relief in Tulsa County District Court alleging the following grounds for relief: (1) ineffective assistance of counsel, (2) double jeopardy, (3) "stacked charges/same transaction/act

(10)

or impulse," and (4) involuntary guilty plea. The state trial court entered its order denying post-conviction relief on February 22, 1996. That court considered the merits of Petitioner's claims of ineffective assistance of counsel and double jeopardy and found them to be without merit. In addition, the state trial court found that "no appeal has been sought or perfected, nor has any sufficient reason been offered by the petitioner for petitioner's failure to do so. Therefore, the Court finds that the petitioner has waived any remaining issues and petitioner's Application is denied." (#4, Ex. G at 4). Petitioner appealed the decision to the Oklahoma Court of Criminal Appeals which, after reviewing the record, stated that "[t]he record Petitioner has presented does not support his contentions. The record does nothing more than set out the allegations of error, as shown above, without additional argument or substantiation. Petitioner has failed to establish that he was denied effective assistance of counsel or that his convictions violate the doctrine of double jeopardy." (#4, Ex. M at 3). In addition, the Court of Criminal Appeals stated that "Petitioner's application fails to articulate sufficient reason or special circumstance explaining his failure to timely file a certiorari appeal as set forth in Section IV, 22 O.S.Supp.1995, Ch.18, App., Rules of the Court of Criminal Appeals, and as required by Section 1086 of Title 22." (#4, Ex. M). The Court of Criminal Appeals affirmed the district court's denial of post-conviction relief on May 31, 1996.

Petitioner filed the instant federal petition for writ of habeas corpus on June 25, 1996. He raises the identical issues presented in his post-conviction proceedings, i.e., (1) ineffective assistance of counsel, (2) violation of the double jeopardy clause, (3) "stacked charges/same transaction or impulse," and (4) that his guilty plea was involuntary.

ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either showing (a) the state's appellate court has had an opportunity to rule on the same claim presented in federal court, or (b) there is an absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254 (b); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "'principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

A. Applicability of the Antiterrorism and Effective Death Penalty Act

On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act ("AEDPA") into law. Because Petitioner filed the instant federal petition for writ of habeas

corpus on June 25, 1996, two months after enactment of the AEDPA, the Court concludes that the provisions of the Act apply to this case.[1]

B. Procedural Bar

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that although the Oklahoma Court of Criminal Appeals stated that Petitioner was not entitled to relief in a post-conviction proceeding because he had not complied with state procedural rules, that court nonetheless reviewed the record Petitioner had presented and specifically concluded that he "failed to establish that he was denied effective assistance of counsel or that his convictions violate the doctrine of double jeopardy."

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[1]Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, rules of general construction provide that new statutory law applies to cases filed on or after the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997); Landgraf v. USI Film Products, 511 U.S. 244 (1994).

Where a petitioner committed a procedural default that could have supplied an "adequate" and "independent" state ground for denying relief, the procedural default doctrine does not apply if "the last state court rendering a judgment in the case" reached the merits of the claim. Harris v. Reed, 489 U.S. 255, 262 (1989); see also Swofford v. Detella, 101 F.3d 1218, 1222 (7th Cir. 1996) (federal review is available because state court, after noting omission by petitioner that would support procedural bar, went on to address merits of claim); Osborn v. Shillinger, 861 F.2d 612, 617 (10th Cir. 1988). In this case, because the Oklahoma Court of Criminal Appeals did not rely exclusively on Petitioner's procedural default in denying his claims but also considered his claims of constitutional violations on the merits, this Court concludes that it is not precluded from considering Petitioner's claims on the merits.

Furthermore, as to Petitioner's claims of ineffective assistance of counsel, the Tenth Circuit Court of Appeals has held that Oklahoma's procedural bar requiring a criminal defendant to raise on direct appeal any claims alleging the ineffectiveness of trial counsel is inadequate to preclude federal habeas review. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994); Brewer v. Reynolds, 51 F.3d 1519, 1522 (10th Cir. 1995); Sack v. Champion, No. 97-7017, 1998 WL 3280 (10th Cir. Jan. 7, 1998). According to the Tenth Circuit, Oklahoma's waiver rule denies any meaningful review of ineffective assistance claims. Brecheen, 41 F.3d at 1364. This Court is bound by the Tenth Circuit precedent which declines to apply Oklahoma's waiver rule to procedurally defaulted ineffective assistance claims. Therefore, even if the Oklahoma Court of Appeals had denied Petitioner's claim based solely on the existence of a procedural default, this Court would not be precluded from reviewing the ineffective assistance of counsel claim on the merits.

C. Petitioner is not entitled to habeas relief pursuant to 28 U.S.C. § 2254

Where a petitioner's claims of constitutional violations have been adjudicated on the merits by the state courts, this Court's review of said claims is highly deferential to the state courts' ruling. Pursuant to the federal statute governing habeas corpus claims filed by petitioners in state custody:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d), as amended by the AEDPA. Furthermore, the federal habeas corpus statute provides that state court findings of fact are presumed correct:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1), as amended by the AEDPA. As discussed infra, application of these standards to the facts of this case leads the Court to conclude that Petitioner is not entitled to habeas corpus relief.

1. Petitioner's claim of ineffective assistance of counsel

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. A federal court reviewing an ineffective assistance of counsel claim will

begin by presuming that counsel's representation was within that wide range of reasonable, professional assistance that can be considered sound trial strategy. A federal court will also review counsel's performance from counsel's perspective at the time the representation was rendered, and not through the distorting lens of hindsight.

To prevail on a claim of ineffective assistance of counsel under the Sixth Amendment, Petitioner must first overcome the presumption of constitutionally adequate representation and show that his counsel committed a serious error in light of prevailing professional norms. In other words, Petitioner must conclusively demonstrate that counsel's representation fell below an objective standard of reasonableness and so undermined the proper functioning of the adversarial process that the result reached in the trial court cannot be relied on as just. If Petitioner establishes that his counsel's performance was constitutionally ineffective, he must then demonstrate that there is a reasonable probability that the outcome in the trial court would have been different had counsel performed effectively. Strickland v. Washington, 466 U.S. 668 (1984); Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994).

In the instant application, Petitioner alleges his attorney was ineffective because he "failed to object to the numerous illegalities of said sentence, and did NOT preform [sic] to the strands [sic] as set by law for perforamce [sic]. Ineffectiveness of counsel is/was present. Had counsel performed to standards, the total outcome of the proceedings would have been different." (#1 at 6). After reviewing the pleadings submitted by Petitioner, it seems the focus of his claim is that he received two 14 year sentences to run consecutively rather than two 28 year sentences to run concurrently and that his counsel failed to object to the sentences as imposed by the trial court judge. (#5 at 1). However, the only evidence submitted by Petitioner in support of his claim of ineffective assistance

of counsel consists of a letter he received from his counsel (#7, Exhibit).[2] In the letter, Petitioner's counsel, discussing Petitioner's sentences, states that "[u]nfortunately, it was 14 years running back to back, or consecutively. In retrospect, perhaps we should have just gone ahead with a 28 year sentence concurrently. But in any event that was the plea agreement." Although Petitioner states that this "proves he knew what he did was wrong, making this Ineffective Assistance of Counsel" (#7 at 2), the Court disagrees with Petitioner's conclusion. According to the "Plea of Guilty/ Summary of Facts" provided by Respondent, Petitioner indicated he understood that the Court was not bound by any agreement or recommendation and that if the Court did not accept the plea agreement, Petitioner had the right to withdraw his plea of guilty. (#4, Ex. D, question no. 18(A)(1)). Furthermore, Petitioner signed the "Plea of Guilty/Summary of Facts" thereby acknowledging that he understood his rights and the sentence imposed, clearly identified, on the same page as Petitioner's signature, as 14 years on each count to run consecutively. Petitioner also indicated he understood that he had the right to appeal from his conviction on a plea of guilty by filing a written application to withdraw plea of guilty within ten (10) days of sentencing. (#4, Ex. D., question no. 24). However, the record does not establish that he sought to withdraw his guilty plea or that he ever asked his attorney to file such a motion. Regardless of Petitioner's understanding of the plea agreement, i.e., that he would be sentenced to 28 years on each count to run concurrently, as opposed to 14 years on each count to run consecutively, the record does not indicate that counsel's performance in this matter was deficient. Other than Petitioner's conclusory allegations and the letter submitted by Petitioner, the record before the Court does not support Petitioner's claim of ineffective

[2]On February 10, 1998, Petitioner was granted leave to submit additional evidence consisting of a letter, dated March 25, 1997, received by Petitioner from his counsel.

assistance of counsel. Nothing indicates counsel's performance fell below an objective standard of reasonableness.

In addition, and of greater significance, although Petitioner states that "had counsel performed to standards, the total outcome of the proceedings would have been different," he does not indicate how the proceedings would have been different and does not allege that but for counsel's performance he would have changed his plea and proceeded to trial on the charges against him. See Hill v. Lockhart, 474 U.S. 52, 59 (1985) (stating that, where a defendant has entered a plea of guilty, in order to satisfy the "prejudice" requirement of Strickland, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial).

Petitioner's claim of ineffective assistance of counsel fails to satisfy either the performance or the prejudice prong of Strickland. The Court concludes that because the state courts' adjudication of this claim is consistent with clearly established Federal law and reflects a reasonable determination of the facts in light of the evidence presented in the state court proceedings, Petitioner is not entitled to habeas corpus relief on his claim of ineffective assistance of counsel. See 28 U.S.C. § 2254(d).

2. *Petitioner's double jeopardy claim and his claim that the charges against him were stacked and resulted from the same transaction or impulse*

The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In part, the Double Jeopardy Clause protects against "multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnote omitted). Petitioner in this case contends that his sentence was based upon

the impermissible stacking of counts in the information, resulting in multiple punishments for the same offense. He contends that he was sentenced twice on identical counts of sexual abuse of a minor child. However, the Information filed in the state trial court indicates that Petitioner was charged with one count of sexually abusing a minor child which occurred on February 10, 1995, and a second count of sexually abusing a minor child which occurred on February 11, 1995. (#4, Ex. B). Thus, it is clear from the face of the Information that Petitioner was charged with two separate criminal acts. Petitioner pled guilty to the two counts of the Information. Petitioner admitted that he did the discrete acts described in the information and that he was therefore guilty of the substantive crimes charged in the information. See United States v. Broce, 488 U.S. 563, 574-75 (1989).

Furthermore, in Petitioner's state post-conviction proceedings, the district court considered Petitioner's double jeopardy claim and found it to be without merit stating that "the Double Jeopardy Clause is not carte blanche for an accused to commit as many offenses as desired. To hold otherwise would violate the holding in Salyer v. State, 761 P.2d 890 (Okl. Cr. 1988), that 'to hold that a man may repeatedly sodomize a boy yet only be punished for one offense, would provide him with an invitation to engage in multiple criminal conduct at the expense of the victim. Such a decision would be unthinkable.'" (#4, Ex. G.). The Oklahoma Court of Criminal Appeals reviewed the record and agreed with the district court, stating that "Petitioner has failed to establish . . . that his convictions violate the doctrine of double jeopardy." (#4, Ex. M). Nothing in the record presented by Petitioner in the instant case indicates a violation of the Double Jeopardy Clause. The Court concludes that because the state courts' adjudication of this claim is consistent with clearly established Federal law and reflects a reasonable determination of the facts in light of the evidence

presented in the state court proceedings, Petitioner is not entitled to habeas corpus relief on his claim of violation of the prohibition against double jeopardy. See 28 U.S.C. § 2254(d).

3. Petitioner's claim that his guilty plea was involuntary

In Petitioner's state post-conviction proceedings, the Court of Criminal Appeals reviewed the record presented by Petitioner and concluded that it did not support Petitioner's contentions. Furthermore, the state district court found that "at the time of plea, petitioner was advised by the court of the right to a jury trial, the right to cross examine witnesses and the right to testify if petitioner so desired. At the time of petitioner's plea and sentencing, petitioner was represented by an attorney. At the time of sentencing, petitioner was advised by the court of the [right] to appeal the conviction." (#4, Ex. G). The Court of Criminal Appeals affirmed these findings. (#4, Ex. M). In addition, the "Plea of Guilty/Summary of Facts" executed by Petitioner contains an acknowledgment that he entered a plea of guilty of his own free will, and without any influence of promise, pressure, threat, force, or mistreatment from any official, private person, or his lawyer. (#4, Ex. D). Petitioner also alleges that his guilty plea was involuntary because "no factual basis for plea was sought." (#1 at 7). However, in the "Plea of Guilty/Summary of Facts" Petitioner was directed to "state the factual basis for your plea(s)." Petitioner wrote the following:

> Yes, I did commit these crimes. I do not really want to go into detail about them. For what reason a grown man would commit crimes like this against a minor child is beond (sic) me. I just hope [the victim] and myself can get the proper mental help needed to continue a normal healthy life without this ever reoccuring (sic). This took place while my wife worked. I did play with [the victim's] privets (sic) and said not to tell.

(#4, Ex. D question no. 19). Petitioner presents no evidence to contradict his statement made in the "Plea of Guilty/Summary of Facts" or to otherwise support his claim that his plea of guilty was

involuntary. The Court concludes that Petitioner has failed to rebut the state courts' findings as to this claim, which are presumed correct. See 28 U.S.C. § 2254(e)(1).

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 15th day of June, 1998.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PERRY LEE JONES, JR.,

Petitioner,

vs.

TULSA COUNTY STATE PROSECUTORS; SPECIAL WITNESS COORDINATORS; OKLAHOMA DEPARTMENT OF HUMAN SERVICES; SOCIAL WORKER MRS. JOYCE PORTER; CRISIS INTERVENTION FOSTER CARE,

Respondents.

Case No. 98-CV-402-B (J)

ORDER

Petitioner, a pretrial detainee in custody at the Tulsa County Jail, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (#1) and a motion for leave to proceed *in forma pauperis* (#2). Based on the representations in the motion and supporting affidavit, the Court finds that Petitioner is without funds sufficient to pay the filing fee necessary to commence this action. Therefore, the Court concludes Petitioner's motion should be granted and he should be allowed to proceed without prepayment of the filing fee.

In his petition, Petitioner states that he is a pretrial detainee awaiting trial in Tulsa County District Court on charges of sexual abuse of a minor child. Petitioner states his claims as follows:

> Ground One: Coerced minor witnesses, defense not present. Respondents are in direct violation of my civil rights according to fith (sic) amend right of an accused individual to have coerced or compelled testimony used against me in a court of law: Tulsa Co. prosecutors and special witness coordinators are in color of federal law due to compelling of witnesses.

Ground Two: Mr. Porter of DHS makes statement defendants are given direct infringment (sic) rights by allowing coordinators of Tul Co. Dist Attorneys office unlimited access to young impressionable witnesses as a privilege of state law by way of supposed therapy also in violation of Okla state statutes -- due to D.H.S. workers having prejudicial controle (sic).

Ground Three: Tulsa Co. Dist Court denys (sic) my right to having reasonable bond set: the present bond can only be looked at as being an deliberat (sic) act of punisment (sic) in its accessive (sic) amount due to my only being an individual of minimal financial means: I have been denied bond reduction 4 times in Tul Co. Dist Court.

(#1). Petitioner bases his § 2241 habeas corpus claims on alleged violations of the protection afforded by the 5th and 14th Amendments to the United States Constitution. Petitioner also attaches to his petition five (5) letters from friends and co-employees attesting to his character.

The Supreme Court has established that "federal habeas corpus does not lie, absent 'special circumstances,' to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 489 (1973) (citing Ex parte Royall, 117 U.S. 241, 253 (1886)). To allow otherwise would permit the "derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court." Id. at 493. Although Petitioner does not specifically describe the relief he seeks in this court, it is clear that pretrial habeas corpus is not available to prevent a prosecution in state court. See Capps v. Sullivan, 13 F.3d 350, 353 (1993).

Furthermore, in the instant case, intervention by this Court at this stage in the prosecution of Petitioner by the State of Oklahoma would violate the doctrine of exhaustion. As applicable to 28 U.S.C. § 2241,[1] the doctrine is "a judicially crafted instrument which reflects a careful balance

[1]In contrast to 28 U.S.C. § 2254, no statutory exhaustion requirement applies to § 2241, but case law holds "that although section 2241 establishes jurisdiction in the federal court to consider pretrial habeas corpus petitions, federal courts should abstain from the exercise of that jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner." Capps, 13 F.3d at 354 (citing Dickerson v. Louisiana, 816 F.2d 220, 225 (5th Cir. 1987)).

between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" Braden, 410 U.S. at 490 (citation omitted). Significantly, the doctrine serves to

> preserve[] the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, (the doctrine) preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts.

Id. at 490-91 (quoting Note, *Developments in the Law -- Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1094 (1970)).

The Court concludes that pretrial habeas corpus relief does not lie in this case. Petitioner must afford the courts of the State of Oklahoma the opportunity to consider and correct any violations of the Constitution by raising these issues at trial and, if convicted, on direct appeal.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion for leave to proceed *in forma pauperis* (#2) is **granted;** and

2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **denied.**

SO ORDERED THIS 12th day of June, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 98CV0184B(E)
	)	
CAROLINE M. HERMAN,	)	ENTERED ON DOCKET
	)	
Defendant.	)	DATE 6-15-98

DEFAULT JUDGMENT

This matter comes on for consideration this 12th day of June, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Caroline M. Herman, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Caroline M. Herman, was served with Summons and Complaint on April 25, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Caroline M. Herman, for the principal amount of $1,814.48, plus accrued interest of $1,252.73, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.434 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/LLF

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH D. SANDERS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

Case No. 97-C-94-K(J)

REPORT & RECOMMENDATION

Petitioner filed a Petition for a Writ of Habeas Corpus on January 31, 1997. The case was referred by minute order dated January 31, 1997, to the Magistrate Judge for report and recommendation.

I. ISSUES RAISED ON APPEAL

Petitioner initially asserts that he was the improper recipient of an evidentiary harpoon. Petitioner explains that the police officer who testified at trial offered voluntary statements to the jury which prejudiced the rights of Petitioner. Petitioner asserts that the statements of the police officer deprived Petitioner of his presumption of innocence and his right to a fair trial. Petitioner, in conjunction with this argument, states that his conviction should be reversed, or at the very least modified due to Plaintiff's excessive 20 year sentence for stealing $12.00. Because Petitioner is representing himself, the Magistrate Judge liberally construes Petitioner's Petition as raising, as an additional issue, that the excessiveness of his punishment violates the Eighth Amendment.

Petitioner's "second" issue addresses prosecutorial misconduct. Petitioner asserts that the prosecutor discussed parole considerations in his closing argument and therefore deprived Petitioner of his presumption of innocence and permitted the jury to improperly consider the possibility of Petitioner's parole.

Petitioner asserts as an additional error on appeal the actions of the appellate court. Petitioner notes that one state appellate court judge dissented from the majority opinion and recognized the errors which occurred at Petitioner's trial, but that the remaining appellate court judges failed to properly consider the prejudice which occurred due to the behavior of the prosecutor. This argument is essentially the same as Petitioner's second issue, but is extended to incorporate the actions of the appellate court judges.

II. PROCEDURAL HISTORY

Petitioner was convicted on November 17, 1995, of robbery with a dangerous weapon, and sentenced to 20 years. Petitioner appealed the conviction to the Oklahoma Court of Criminal Appeals. In a summary opinion issued August 12, 1996, the Oklahoma Court upheld the decision of the trial court.

One judge of the Oklahoma Court of Criminal Appeals filed a separate opinion, concurring in part and dissenting in part. The judge noted that he concurred in the affirmance of the judgment, but that he dissented with respect to the approval of the sentencing. The judge concluded that the evidence supplied by the police officer concerning three warrants which were outstanding with respect to Petitioner could have affected the verdict. In addition, the judge concluded that some of the

statements made by the prosecutor were intended to draw the jury's attention to the possibility of parole in an effort to obtain a lengthier sentence. The dissenting judge concluded that he would modify Petitioner's sentence to ten years.

III. EXHAUSTION AND EVIDENTIARY HEARING

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

Petitioner's two main issues were presented in a direct appeal to the Oklahoma Court of Criminal Appeals and have therefore been exhausted. Petitioner's third issue is essentially the same as his second issue, which has already been exhausted, except that Petitioner asserts that the appellate court judges committed error.

The Court has interpreted Petitioner's Petition as additionally raising the issue of the excessiveness of his punishment. This issue has not been previously presented by Petitioner to the Oklahoma courts. However, the Court concludes that presenting this issue to the state court would be "futile," because Petitioner did not previously

raise the issue and the state court would now consider the issue procedurally barred. Petitioner has therefore "exhausted" this issue for the purpose of habeas review.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

In Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted that

> If a federal court that is faced with a mixed petition[1/] determines that the petitioner's unexhausted claims would now be procedurally barred in state court, "there is a procedural default for purposes of federal habeas." Therefore, instead of dismissing the entire petition, the

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[1/] The Harris court's focus was on "mixed petitions." In Rose v. Lundy, 455 U.S. 509, 522 (1982), the Supreme Court determined that a district court "must dismiss habeas petitions containing both unexhausted and exhausted claims."

> court can deem the unexhausted claims procedurally barred and address the properly exhausted claims.

Id. at 1131 n.3 (citations omitted). The Tenth Circuit referenced the Supreme Court decision in Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). The Coleman court observed that

> This rule [that a state court must articulate in its order its reliance on a procedural bar] does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman, 501 U.S. at 735 n.1.

To the extent that the issue which the Court raises on behalf of Petitioner has not been presented in state court, it has not been "exhausted." However, requiring Petitioner to return to state court to exhaust that claim (assuming Petitioner wishes to raise the claim in this habeas action), would be futile because the state court would decline to address the claim on the merits and the claim would be "procedurally barred."

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the Magistrate Judge declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part* by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

IV. RECOMMENDATION REGARDING ALLEGED ERRORS

A. THE ASSERTED "EVIDENTIARY HARPOON" DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL

Petitioner asserts that the police detective who testified improperly volunteered information which was detrimental to Petitioner. Petitioner notes that the police officer was asked whether or not he determined the name of the driver of the car, and the police officer's answer was that the vehicle "had three outstanding warrants listed on it and the driver wanted in connection with those warrants was a Kenneth Sanders." Petitioner noted that his attorney objected to this "evidentiary harpoon," and that this testimony unfairly prejudiced the jury against Petitioner.

An "evidentiary harpoon" is a term of art that has been used by state courts to describe a situation where the witness for the government, while testifying for the government in a criminal case, deliberately provides inadmissible testimony with the purpose of prejudicing the defendant. See United States v. Hooks, 780 F.2d 1526 (10th Cir. 1986).

In this case, the police officer testified that he learned of three outstanding warrants on Petitioner. In Hopkinson v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989), the Tenth Circuit Court of Appeals held that the admission by a state court of evidence of other crimes did not warrant habeas relief unless "the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies the defendant due process of law."

The admission of the testimony of the police officer regarding three warrants which were outstanding on Petitioner has very little if any probative value. The court has reviewed the transcript and concludes that any resulting prejudice did not deny Petitioner due process of law or deprive Petitioner of a fair trial. The reference to three outstanding warrants was very limited and is not highly prejudicial. In addition, the victim of the crime testified that Petitioner stole the money, struggled with him, and stabbed him. Two other individuals additionally identified Petitioner as the perpetrator of the crime. Based on the trial transcript, the Magistrate Judge recommends that the District Court find that Petitioner was not deprived of due process or a fair trial based on the limited testimony of the police officer.

B. PROSECUTORIAL MISCONDUCT: DISCUSSION OF PAROLE POSSIBILITIES

Petitioner additionally argues that his Petition for a Writ of Habeas Corpus should be granted because of the misconduct of prosecution's counsel. Petitioner asserts that the prosecuting attorney improperly mentioned the possibility of parole, and that the reference to the possibility of parole could have influenced the jury in imposing a longer sentence. Petitioner notes that the Oklahoma courts have concluded that permitting the jury to speculate on parole possibilities is improper.

A Petitioner "can obtain federal habeas corpus relief only if his custody is in violation of the Federal Constitution." Mabry v. Johnson, 467 U.S. 504, 505 (1984). See also Townsend v. Sain, 372 U.S. 293, 312 (1963); 28 U.S.C. § 2254(a). Under the new federal habeas corpus statute, relief is limited to claims which (1) result in a decision contrary to clearly established federal law, or (2) result in a decision based on

an unreasonable determination of the facts. As noted above, based on the evidence the decision is clearly not based on an unreasonable determination of the facts.

Petitioner's assertion that the jury considered the possibility of parole during the deliberation of his guilt or innocence does not allege a violation of clearly established federal law.

In Monroe v. Collins, 951 F.2d 49, 52 (5th Cir. 1992), the court determined that the juror's consideration of parole, although violative of state law, did not offend the federal constitutional rights of the defendant.

> Because it is not repugnant to the federal constitution for a state to accurately instruct the jury on parole procedures, it follows that a state trial juror's accurate comments about parole law do not offend the federal constitutional rights of the defendant.

Id. at 52. Monroe was based, in part, on the Supreme Court's decision in California v. Ramos, 463 U.S. 992 (1983). In Ramos, the Supreme Court indicated that the consideration by a jury of executive clemency powers does not render a trial fundamentally unfair under the federal constitution.

> We do not suggest that there would be any federal constitutional infirmity in giving an instruction concerning the Governor's power to commute the death sentence. We note only that such comment is prohibited under state law . . . . Surely, the respondent cannot argue that the Constitution prohibits the State from accurately characterizing its sentencing choices.
> * * *
> We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States. We hold only that the Eighth and Fourteenth Amendments do not prohibit such an instruction.

Id. at 3455 n.19.

Petitioner additionally asserts as his "third" issue that the state appellate court erred in failing to decide the direct appeal in Petitioner's favor based on the misconduct of the prosecutor and the possible consideration by the jury of parole. This issue raises nothing in addition to the alleged error of the trial court.

The Magistrate Judge concludes that the prosecutor's mention to the jury of the possibility of parole does not raise a federal issue. The Magistrate Judge recommends that the District Court deny Petitioner's Petition for a Writ of Habeas Corpus.

C. PETITIONER'S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Petitioner seems to generally suggest that the punishment he received was excessive. Petitioner states in his Petition that he was sentenced to twenty years which is ten years above the minimum[2/] and he stole only $12.00. Petitioner additionally notes that the person described as the "alleged victim" was not seriously injured and Petitioner was stabbed. The Court has construed Petitioner's arguments as raising an additional issue that Petitioner's sentence was excessive and violates the U.S. Constitution.

In Solem v. Helm, 463 U.S. 277, 284 (1983), in considering the constitutionality of a mandatory life sentence imposed pursuant to a South Dakota

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[2/] The minimum sentence available to Petitioner was ten years because he was convicted of robbery with a dangerous weapon after former conviction of a felony.

recidivist statute,[3/] the Supreme Court recognized that the Eighth Amendment requires that a sentence not be disproportionate to the severity of the crime or involve unnecessary infliction of pain. The Court listed three factors for consideration in conducting a proportionality review: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. Id. at 292. The Court noted, however, that in reviewing the proportionality of a sentence, a court should "grant substantial deference" to the discretion of legislatures and the trial courts in determining the limits and punishments for crimes. Solem, 463 U.S. at 290. Furthermore, "outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." Id. at 289-90 (citations omitted). Under the Solem three-factor test, the Solem Court found that the mandatory life sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.

The Supreme Court considered the constitutionality of a mandatory life sentence in Harmelin v. Michigan, 501 U.S. 957 (1991). In Harmelin, the petitioner was convicted under a Michigan statute for possessing more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without the possibility of

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[3/] In Solem, the petitioner was convicted of seven non-violent felonies. Petitioner's seventh conviction was for "uttering a no account check for $100." Solem at 280. A recidivist statute provided that prior conviction of at least three offenses, in addition to the current offense required sentencing based on a "class A" felony. The sentence for a class A felony was life imprisonment with no possibility of parole, which was the sentence which Solem received.

parole. 501 U.S. at 961. The petitioner's main contention was that the life sentence was "significantly disproportionate" to the crime committed.

Noting and discussing the Solem and Harmelin differences, both the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have concluded that only if a sentence is grossly disproportionate (after a comparison of the sentence to the offense is made) should a sentence be analyzed under the remaining factors in Solem. See McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992); McGruder v. Puckett, 954 F.2d 313 (5th Cir. 1992). See also Neal v. Grammar, 975 F.2d 463 (8th Cir. 1992). Some Circuits have continued to apply the factors in Solem, noting that a majority of the Harmelin court declined to expressly overrule Solem. United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995). The Tenth Circuit Court of Appeals has thus far declined to decide whether or not Harmelin overruled Solem. In at least one case the Tenth Circuit has analyzed the challenged sentence under the factors outlined in Solem, and if the sentence was not so disproportionate as to violate the Eighth Amendment in accordance with Solem, the Court has concluded that further analysis was not necessary. See, e.g., United States v. Angulo-Lopez, 7 F.3d 1506 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994). See also United States v. Montoya, 85 F.3d 641, 1996 WL 229188 (10th Cir. May 7, 1996).

The Supreme Court has acknowledged that sentences that are imposed within the sentencing guidelines of the sentencing state are generally not considered disproportionate and that sentences that are "less" than death are generally not considered disproportionate. Solem v. Helm, 463 U.S. 277, 290 (1983) (a court

should "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."). See also United States v. Youngpeter, 986 F.2d 349, 355-56 (10th Cir. 1993) (when sentence falls within statutory limits, as was defendant's in this case, the appellate court "generally will not regard it as cruel and unusual"). In Oklahoma, an individual convicted for robbery with a dangerous weapon can be sentenced in the range of five years to life. 28 Okla. Stat. 1991, § 801. Petitioner's sentence is within the statutory guidelines and therefore presumed constitutional. In addition, Petitioner's sentence was "after former conviction of a felony."

The Magistrate Judge concludes that the sentence imposed on Petitioner was not in violation of the Eighth Amendment to the United States Constitution, and recommends that Petitioner's Petition be denied.

CONCLUSION

The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this

Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 12 day of June 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 15 Day of June, 1998.

L. Schwelke

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MITZI C. HALE,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-815-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 12th day of June, 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLEN J. HINTZ,

Plaintiff,

vs.

DANA CORPORATION,
a Virginia Corporation,

Defendant.

Case No. 97-CV-439 H(J)

ORDER OF DISMISSAL

NOW before the Court is the Stipulation of Dismissal of the parties to this action, advising that Plaintiff no longer wishes to pursue his causes of action herein. Upon review of such Stipulation of Dismissal, this court finds that an Order of Dismissal should be entered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be, and hereby is, dismissed with prejudice pursuant to the Stipulation of Dismissal submitted by all parties to this action, , with all parties to bear their own costs and fees.

DONE this 12TH day of June, 1998.

United States District Judge

Randall J. Snapp
CROWE & DUNLEVY
321 South Boston, Suite 500
Tulsa, OK 74103-3313
(918) 592-9855
(918) 599-6335 - Fax
ATTORNEYS FOR DEFENDANT,
DANA CORPORATION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 12 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALLEN J. HINTZ,

Plaintiff,

vs.

DANA CORPORATION, a Virginia Corporation,

Defendant.

Case No. 97-CV-439 H(J)

ENTERED ON DOCKET

DATE 6-15-98

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW, the parties to this action and stipulates to the dismissal of this case with prejudice because the Plaintiff does not wish to pursue his claims. All parties shall bear their own costs and fees incurred in the prosecution of this claim.

Allen J. Hintz
Route 1, Box 256-5
Bluejacket, OK 74333

Randall J. Snapp
CROWE & DUNLEVY
Suite 500, 321 South Boston
Tulsa, Oklahoma 74103-3313

ATTORNEYS FOR DEFENDANT,
DANA CORPORATION

CERTIFICATE OF MAILING

I, Randall J. Snapp, hereby certify that on the 12TH day of June, 1998, I mailed a true and correct copy of the above and foregoing with proper postage thereon fully prepaid, to:

Mr. Allen J. Hintz
Route 1, Box 256-5
Bluejacket, OK 74333

Randall J. Snapp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD W. TITTERUD, an individual,

Plaintiff, and

RICHARD W. TITTERUD as Custodian for Eric P. Titterud; KARLA TITTERUD, an individual; VICKIE TITTERUD JOHNSON, an individual; and STEVEN TITTERUD, an individual,

Additional Plaintiffs,

vs.

SNAPPY CAR RENTAL, INC., an Ohio corporation, and BENJAMIN R. JACOBSON, an individual,

Defendants,

and

JP ACQUISITION GROUP, L.P., a Netherlands Antilles limited partnership; JP ACQUISITION FUND, L.P., a Delaware limited partnership; SNAPPY ACQUISITION FUND, L.P., a Delaware limited partnership; JAMES F. WILSON, an individual; GARY B. VONK, an individual; R. LYNN SKILLEN, an individual; AMCITO PARTNERS, a New York limited partnership; MICHAEL J. FUCHS, an individual; GEORGE A. KELLNER, an individual; GERALD L. PARSKY, an individual; SCR ACQUISITION GROUP, C.V., a Netherlands Antilles limited partnership; DEANSTREET ASSOCIATES, a New York limited partnership; DENNIS PEDRA, an individual; KENDRICK F. WILSON

No. 97-CV-518-B (M)

III, TRUSTEE UNDER THE JAMES F. WILSON IRREVOCABLE FAMILY TRUST DATED JANUARY 12, 1996; UNICORN PROCUREMENT COMPANY LIMITED, an Isle of Mann corporation; HARRISON R. HORAN, an individual; SUSAN TEEMAN, an individual; STEPHEN A. FURBACHER, an individual; MICHAEL J. FUCHS, TRUSTEE UNDER THE TRUST AGREEMENT DATED MARCH 8, 1989 FOR THE BENEFIT OF NICHOLAS KARLSON; MICHAEL J. FUCHS, TRUSTEE UNDER THE TRUST AGREEMENT DATED DECEMBER 21, 1987 FOR THE BENEFIT OF SARA K. JACOBSON; PAUL HOAGLAND, an individual; DEBORAH ANNE SARRO-AKALSKI, an individual; McDONALD & COMPANY SECURITIES, INC.; and DEBORAH ANNE SARRO-AKALSKI as CUSTODIAN FOR ERIC JOHN AKALSKI,

Additional Defendants.

PARTIAL DISMISSAL WITHOUT PREJUDICE

Plaintiffs Richard W. Titterud, Karla Titterud, Vickie Titterud Johnson and Steven Titterud hereby dismiss without prejudice their claims against the following Additional Defendants: Gary B. Vonk, R. Lynn Skillen, Unicorn Procurement Company Limited, Harrison R. Horan, Susan Teeman, Stephen A. Furbacher, Paul Hoagland, Deborah Anne Sarro-Akalski, McDonald & Company Securities, Inc. and Deborah Anne Sarro-Akalski as Custodian for Eric John Akalski.

Respectfully submitted,

Nancy Glisan Gourley OBA # 10317
GOURLEY & PROSZEK P.L.L.C.
2727 E. 21st, Ste. 103
Tulsa, OK 74114-3523
Phone: (918) 748-7901
Fax: (918) 744-8699

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 1998, a true and correct copy of the foregoing Partial Dismissal Without Prejudice was served by placing it in the U.S. Mail with sufficient First Class postage thereon to J. Ronald Petrikin, CONNER & WINTERS, 3700 First Place Tower, 15 E. 5th Street, Tulsa, OK 74103.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL E. BYERS,
SSN: 400-76-1250,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

Case No. 96-CV-1080-EA

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 11th day of June 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL E. BYERS,
SSN: 400-76-1250,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,[1]

Defendant.

Case No. 96-CV-1080-EA

ORDER

Claimant, Michael E. Byers, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[2] In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Circuit Court of Appeals.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the

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1 Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2 On October 17, 1994, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.), with a protected filing date of September 8, 1994. Claimant's application for benefits was denied in its entirety initially (December 28, 1994), and on reconsideration (February 9, 1995). A hearing before Administrative Law Judge Larry C. Marcy (ALJ) was held October 19, 1995, in Tulsa, Oklahoma. By decision dated November 1, 1995, the ALJ found that claimant was not disabled on or before the date of the decision. On September 20, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Court **REVERSES** the Commissioner's decision and **REMANDS** for further proceedings consistent with this opinion.

I. CLAIMANT'S BACKGROUND

Claimant, who resides in Broken Arrow, Oklahoma, was born on October 27, 1957, and was 38 years old at the time of the ALJ decision. He completed the ninth grade. Claimant alleges an inability to work beginning June 27, 1994 due to back and leg pain, and impaired hearing. His past relevant work includes mover, truck driver, laundry worker, and order filler.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social

Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[3]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

The issues before the Court are whether the Commissioner applied the correct legal standards and whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir.

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[3] Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

1981). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the RFC to perform the exertional demands of sedentary work, and had no significant nonexertional impairments which narrow the range of work he can perform. The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his age, education, work experience, and RFC. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

IV. MEDICAL HISTORY OF CLAIMANT

A. Orchiectomy:

Claimant began developing pain and atrophy of his right testis in June 1993 after heavy lifting. (R. 126) After conservative treatment for more than a year with antibiotics and anti-inflammatories, claimant complained of chronic pain in the area of the right testicle. (Id.) Although claimant did not have to have the testicle removed, he was adamant that he wanted it removed because of chronic pain. (R. 132) On September 15, 1994, claimant underwent a right inguinal orchiectomy [testicle excision]. (R. 125) He healed well, and his surgeon, Dr. David Harper, did not believe he would have long-term problems from his surgery. (R. 132)

Claimant states that he became unable to work on June 27, 1974 (R. 61, 65), and in a September 1994 Disability Report listed his disabling condition as "my right testis." (R. 109)

B. Back and Leg Pain:

Claimant underwent back surgery in 1976 (R. 111), but during the relevant work period was involved in heavy lifting, primarily as a mover of household goods. (R. 113) In a visit to his urologist in September 1994, claimant reported intermittent back and leg pain from "disc surgery years ago." (R. 133) Claimant saw an internist, Dr. Lawrence Reed, for back and leg pain from October 1994 to February 1995. (R. 138-139, 141) Dr. Reed prescribed Soma and Vicodin. (Id.)

On October 5, 1995, claimant presented himself to the St. John Medical Center emergency room complaining of acute and chronic back pain. He was referred to Dr. Stephen Tillim for evaluation of lower back and right leg pain. (R. 149-150, 151-152) Dr. Tillim reported that claimant "has walked with a cane," that straight leg raising is "positive on the right at 60 degrees and unremarkable on the left." (R. 151) Dr. Tillim observed that "his acute symptoms have resolved but in order to evaluate him he would need MRI scan and possibly a myelogram. . . ." (R. 152)

The ALJ hearing was October 19, 1995, and a decision denying benefits was issued November 1, 1995.

The Appeals Council received additional evidence from Dr. Reed -- a report dated February 5, 1996. (R. 4, 154-159) Dr. Reed reported that he saw claimant in June 1995 and January 1996 (in addition to the previous visits referenced above). (R. 155) Dr. Reed diagnosed "[r]ecurrent herniated lumbar disc L5 area resulting in nerve root compression right lower extremity." (R. 158) Dr. Reed recommended an MRI and consultation with an orthopedic surgeon. (Id.) Dr. Reed opined that claimant was "temporarily totally disabled." (Id.)

C. **Hearing Loss:**

Claimant complains of impaired hearing. A January 17, 1994 examination by audiologist Stanley Lang, Ph.D. showed some hearing loss. (R. 140) A September 1994 Disability Report completed by an interviewer over the telephone shows: "No problem hearing. Appeared to understand the questions and application process." (R. 116) A Residual Physical Functional Capacity Assessment completed by Dr. Luther Woodcock in December 1994 shows no hearing limitation. (R. 74)

V. REVIEW

Claimant alleges as error:

1. The Commissioner's failure to accord proper weight to the findings and opinion of a treating physician;

2. The ALJ's RFC, pain and credibility assessments are not supported by substantial evidence in light of new and material evidence presented to the Appeals Council; and

3. The Commissioner's failure to meet his Step Five burden to prove claimant retained the RFC to perform the prolonged sitting required of sedentary work.

It is well settled that claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). At Step Five, however, the burden shifts to the Commissioner to prove that claimant has the RFC to perform other substantial gainful activity in the national economy. Flint v. Sullivan, 951 F.2d 264 (10th Cir. 1991). The ALJ found that the Commissioner met his burden. (R. 23-24, 25)

1. **Treating Physician Findings and Opinion:**

Claimant contends that the Commissioner failed to accord proper weight to the findings and opinion of a treating physician, Dr. Lawrence Reed. The ALJ had before him medical records from Dr. Reed, who treated claimant five times between October 1994 and February 1995 for back pain with radiculopathy. (R. 138-139, 141-142) Dr. Reed prescribed medication for pain and spasm. (R. 148) The ALJ decision never mentions Dr. Reed, his treatment, or the medication. (R. 19-25)

Subsequent to the hearing before the ALJ, claimant submitted to the Appeals Council Dr. Reed's report dated February 5, 1996. (R. 4, 154-159) Claimant correctly points out that this new evidence must be included in the review by this Court as to whether the ALJ's determination is supported by substantial evidence.[4]

A claimant is authorized by Social Security regulation to submit new and material evidence to the Appeals Council. 20 C.F.R. §§ 404.970(b), 416.1470(b). The Appeals Council

> shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

Id. Dr. Reed's report relates to a period before the ALJ decision. (Id.) The Appeals Council made the report part of the record. (R. 6) Without addressing the substance of Dr. Reed's report or the

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[4] The Appeals Council denied review, stating:

> The Appeals Council has also considered the contentions raised in your representative's brief dated August 1, 1996, as well as the additional evidence from Dr. Lawrence Reed dated February 5, 1996, but concluded that neither the contentions nor the additional evidence provides a basis for changing the Administrative Law Judge's decision.

(R. 4) The Appeals Council decision apparently entailed an examination of the entire record, including the new evidence, and necessarily embodies in its conclusion that the additional evidence fails to provide a basis for changing the ALJ's decision. See 20 C.F.R. §§ 404.970(b), 416.1470(b).

weight it was accorded, the Appeals Council summarily stated that the additional evidence did not provide a basis for changing the ALJ's decision. (R. 4) If the Appeals Council denies review, the ALJ decision becomes the Commissioner's final decision. See 20 C.F.R. §§ 404.981, 416.1481. This decision, in turn, is reviewed for application of the correct legal standards, and for substantial evidence based on the "record viewed as a whole." Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1028 (10th Cir. 1994). "[N]ew evidence becomes part of the administrative record to be considered when evaluating the [Commissioner's] decision for substantial evidence." O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994).

Dr. Reed's report is that of a treating physician. (R. 154-159) When the "record viewed as a whole" includes an opinion from a treating physician, the following regulatory directive applies to the weight to be given the opinion:

> If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed below, as well as the factors in paragraphs (d) (3) through (5) of this section in determining the weight to give the opinion. ***We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.***

20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (emphasis added). Nowhere did the ALJ or the Appeals Council meet this regulatory requirement. Thus, the Commissioner failed to give the treating physician's opinion controlling weight, and failed to give good reason for determining what weight to give the opinion.

A treating physician's opinion must be given controlling weight unless good cause is shown to disregard it. Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). The ALJ must give specific,

legitimate reasons for disregarding the treating physician's opinion that claimant is disabled. Id. In this case, those reasons could include any of the factors listed in 20 C.F.R. §§ 404.1527(d), 416.927(d).

Because this legal standard was not followed, the record is incomplete. Absent a finding of controlling weight of the opinion or good reasons for what weight was given the opinion, it is impossible to determine if substantial evidence supports the ALJ decision. If controlling weight is given the opinion, the result might be different than if little weight is given the opinion.

The Commissioner's disregard of the treating physician's opinion is legal error which must be corrected on remand. Upon remand, the Commissioner should (1) consider Dr. Reed's opinion and either give it controlling weight or give specific, legitimate reasons for disregarding the opinion; and (2) discuss the substantial evidence supporting his decision in light of the record as a whole.

Because of the findings made above, the Court need not address the remainder of claimant's arguments.

VI. CONCLUSION

The Commissioner failed to apply the correct legal standards in failing to address the opinion of claimant's treating physician. The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 11th day of June, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 98CV0212BU(E)
BEVERLY D. PASCHAL,	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 11 day of June, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Beverly D. Paschal, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Beverly D. Paschal, was served with Summons and Complaint on April 24, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Beverly D. Paschal, for the principal amount of $1,210.07, plus accrued interest of $916.80, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.434 percent per annum until paid, plus costs of this action.

Michael Burrage
United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/LLF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RODNEY DERON JACKSON,

Petitioner,

vs.

KEN KLINGLER, Warden,

Respondent.

No. 98-CV-404-B (E)

ENTERED ON DOCKET

DATE 6-12-98

ORDER

Plaintiff, a state prisoner appearing *pro se*, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and a motion for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915.

The Court has promptly examined the Petition and, based on the statements contained therein, makes the following findings:

(1) Petitioner is presently a prisoner in the custody of Respondent at the Oklahoma State Reformatory, Granite, Greer County, Oklahoma, located within the territorial jurisdiction of the United States District Court for the Western District of Oklahoma. See 28 U.S.C. § 116(c).

(2) Petitioner alleges that such custody deprives him of his liberty in violation of rights under the Constitution of the United States.

(3) Petitioner is in custody pursuant to a conviction and sentence entered in Case No. CRF-94-289 in the District Court of Payne County, Stillwater, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. 28 U.S.C. § 116(c).

(4) Pursuant to 28 U.S.C. § 2241(d), the Western District as the place of conviction and

incarceration has jurisdiction to entertain the application for writ of habeas corpus.

(5) This Court lacks jurisdiction to entertain this matter. 28 U.S.C. § 2241(d).

According to 28 U.S.C. § 1631, whenever the court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action to any other such court in which the action could have been brought at the time it was filed. Because Petitioner has paid the filing fee to commence this action, the Court finds that it is in the interest of justice to transfer this matter to the proper district rather than dismiss it for lack of jurisdiction.

It is a long-standing policy of the United States District Courts for the State of Oklahoma that justice is normally better served by the adjudication of habeas petitions in the district where the convictions were entered, since that is where the trial court officials and records are located, where trial counsel for the prosecution and the Petitioner are ostensibly available, and where potential witnesses reside. The Court concludes, therefore, that this matter should be transferred to the United States District Court for the Western District of Oklahoma, since that is the district where Petitioner's conviction was entered.

ACCORDINGLY, IT IS HEREBY ORDERED that in the interest of justice and pursuant to 28 U.S.C. §§ 1631 and 2241(d), this case is **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings.

SO ORDERED THIS 11th day of June, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98CV0184B(E)**
	)	
CAROLINE M. HERMAN,	)	
	)	
Defendant.	)	

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of June 11, 1998 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Caroline M. Herman**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 11th day of June, 1998.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By D. Schweble
Deputy Court Clerk for Phil Lombardi

LFR/LLF

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 98CV0047 B (M)
	)	
MANUEL L. RIDGE,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 11th day of June, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Manuel L. Ridge, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Manuel L. Ridge, was served with Summons and Complaint on March 24, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Manuel L. Ridge, for the principal amount of $2,658.80, plus accrued interest of $1,966.01, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.434% percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/llf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 98CV0136E
	)	
ELLEN GARRETT,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of June, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Ellen Garrett, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Ellen Garrett, was served with Summons and Complaint on February 12, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Ellen Garrett, for the principal amounts of $5,639.51 and $2,625.00, plus accrued interest of $1,785.63 and $1,978.56, plus interest thereafter at the rates of 6.79 and 8.00 percent per annum until

judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.434 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/LLF

ENTERED ON DOCKET

DATE 6-12-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98CV0136E**
	)	
ELLEN GARRETT,	)	
	)	
Defendant.	)	

FILED

JUN 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of 6-10-98 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Ellen Garrett**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 11 day of June, 1998.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By _____
Deputy Court Clerk for Phil Lombardi

LFR/LLF

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 98CV0214H(J)**
	)	
O. Z. LAZENB, JR.,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE 6-12-98

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 11th day of June, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of June, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: O. Z. Lazenb, Jr., 1729 W. Haskell, , Tulsa, OK 74106.

Libbi L. Felty
Paralegal Specialist

CJ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NBI SERVICES, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 96-CV-616B
RICHARD A. MARSHACK, As Receiver of Tower Operating Company and Sooner Energy Partners, Ltd. VII,	)	
Defendant.	)	

ORDER FOR DISMISSAL

NOW on this 10th day of May, 1998, the above styled and numbered cause comes on before the Court upon the Joint Stipulation of Dismissal filed herein by the parties hereto. It appearing to the Court that the matters in controversy have been settled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff's causes of action against the Defendant shall be and the same are hereby dismissed with prejudice

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Defendant's cause of action against the Plaintiff shall be and the same is hereby dismissed with prejudice.

IT IS SO STIPULATED.

THOMAS R. BRETT, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OKLAHOMA

Rodney A. Edwards, OBA #2646
EDWARDS & HUFFMAN, L.L.P.
6120 S. Yale, Suite 1470
Tulsa, OK 74136-4223
(918) 496-0444

ATTORNEYS FOR PLAINTIFF

J. Patrick Mensching, OBA #6136
BARROW, GADDIS, GRIFFITH & GRIMM
610 S. Main, Suite 300
Tulsa, OK 74119-1248
(918) 584-1600

ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 96-CV-934-B**
	)	
THE SUM OF ONE THOUSAND FOUR HUNDRED FORTY AND NO/100 DOLLARS ($1,440.00) IN UNITED STATES CURRENCY, et.al.,	)	
	)	
Defendant.	)	

PARTIAL JUDGMENT OF FORFEITURE AS TO DEFENDANT CURRENCY

This cause having come before this Court upon the plaintiff's Motion for Partial Judgment of Forfeiture by Default as to the defendant One Thousand Four Hundred Forty and no/100 Dollars ($1,440.00) in United States Currency as to all entities and/or persons interested in the defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 11th day of October, 1996, alleging that the defendant currency is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange, and subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 17th day of October, 1996, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant currency and for publication of notice of arrest and seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, 8545 East 41st

Street, Tulsa, Oklahoma, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency was located, and further providing that the United States Marshals Service personally serve the defendant currency and all known potential owners thereof with a copy of the Complaint for Forfeiture In Rem and Warrant of Arrest and Notice In Rem, and that immediately upon the arrest and seizure of the defendant currency the United States Marshals Service take custody of the defendant currency and retain the same in its possession until the further order of this Court.

On the 10th day of February, 1997, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant currency.

Alfred Johnny Prince, II was determined to be the only potential claimant in this action with possible standing to file a claim to the defendant currency. The United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant currency as follows:

Alfred Johnny Prince, II, served December 2, 1996.

Alfred Johnny Prince, II filed an answer and counterclaim as to the defendant currency, on February 18, 1997.

USMS 285 reflecting the service upon the defendant currency and all known potential claimants is on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred

first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency was located, on February 27, March 6 and 13, 1997. Proof of Publication was filed June 16, 1997.

No other claims in respect to the defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired.

That the plaintiff, the United States of America, and the claimant, Alfred Johnny Prince, II, entered into a Stipulation for Forfeiture, that One Thousand Four Hundred Forty and no/100 Dollars were seized. That a Stipulation for Forfeiture has been entered into for the forfeiture of Seven Hundred Ten and no/100 ($710.00) of the defendant currency and return of Seven Hundred Ten and no/100 ($710.00) of the defendant currency. The Stipulation was filed February 9, 1998.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant currency:

Seven Hundred Ten and no/100 ($710.00) In United States Currency

be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that Seven Hundred Ten and no/100 ($710.00) In United States Currency shall be returned to Claimant Alfred Johnny

Prince by mailing, delivering, or otherwise releasing to his attorney, James O. Goodwin, P.O. Box 3267, Tulsa, OK 74101.

Entered this 10th day of June, 1998.

THOMAS R. BRETT
Judge of the United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:

CATHERINE J. DEPEW
Assistant United States Attorney

N:\UDD\PJOHNSON\FORFEITU\SAFEHOME\JUDGMENT.STI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 10 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES V. GRAHAM and CONNIE GRAHAM,

Plaintiffs

vs.

GROLIER PUBLISHING COMPANY, GROLIER INCORPORATED and CHILDRENS PRESS, corporations,

Defendants

Case No. 98 CV 0289 B (M)
Creek County D.C. CJ 98-183

ENTERED ON DOCKET
DATE JUN 11 1998

DISMISSAL OF CLAIM, WITHOUT PREJUDICE

The Plaintiffs, James V. Graham and Connie Graham, hereby dismiss their damage claim against the above named Defendants, without prejudice to refiling the same in the future.

James V. Graham

JAMES V. GRAHAM, Plaintiff
611 Pinto Lane
Sapulpa, OK 74066
918-224-9158

Connie Graham

CONNIE GRAHAM, Plaintiff
611 Pinto Lane
Sapulpa, OK 74066
918-224-9158

CERTIFICATE OF MAILING

I hereby certify that on the 10 day of June, 1998, a true copy of the foregoing instrument was deposited in the U.S. Mails, with proper postage thereon prepaid, and addressed to Mark K. Blongewicz and Ronald A. White, 320 South Boston, Ste. 400, Tulsa, OK 74103.

James V Graham

Deft. Counsel has no obj- per phone call 6-11-98. H. Lantz Deputy

CLJ

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 10 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 98CV0171B
	)	
NANCY J. SINOR,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE JUN 11 1998

AMENDED
DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of June, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Nancy J. Sinor, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Nancy J. Sinor, acknowledged receipt of Summons and Complaint on April 22, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Nancy J. Sinor, for the principal amount of $2,731.49 and $3,320.59, plus accrued interest of $1,471.16 and 1,579.89, plus interest thereafter at the rate of 8 percent per annum until judgment, plus

filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.434 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/JMO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NBI SERVICES, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 96-CV-616B
RICHARD A. MARSHACK, As Receiver of Tower Operating Company and Sooner Energy Partners, Ltd. VII,	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL

COME NOW the parties in the above referenced action and hereby stipulate and agree that the matters in controversy have been settled and that (i) Plaintiff's causes of action against the Defendant may be dismissed with prejudice; and (ii) Defendant's cause of action against the Plaintiff may be dismissed with prejudice.

WHEREFORE, the parties stipulate that the above styled and numbered cause being resolved and settled that claims should be dismissed with prejudice as to future filing.

Respectfully submitted,

EDWARDS & HUFFMAN, L.L.P.

By: /s/ Rodney A. Edwards

Rodney A. Edwards, OBA #2646
Robert A. Huffman, Jr., OBA #4456
Two Warren Place
6120 S. Yale, Suite 1470
Tulsa, OK 74136-4223
(918) 496-0444

ATTORNEYS FOR PLAINTIFF

BARROW, GADDIS, GRIFFITH & GRIMM

By: _____

J. Patrick Mensching, OBA #6136
610 S. Main, Suite 300
Tulsa, OK 74119-1248
(918) 584-1600

ATTORNEYS FOR DEFENDANT

RICHARD A. MARSHACK, as Receiver

By: _____

Richard A. Marshack, Receiver

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE BANK & TRUST, N.A., a national banking association, Plaintiff,	)	
vs.	)	Case No. 97-CV-277-B
FIRST STATE BANK OF TEXAS, a state bank organized under the laws of the State of Texas and headquartered in Denton, Texas, Defendant.	)	

ORDER

Now on this 10th day of June, 1998, comes on for hearing Defendant First State Bank of Texas' ("Bank of Texas") Motion for Summary Judgment on its Counterclaim (Docket #15), Plaintiff State Bank & Trust, N.A.,'s ("State Bank") Motion for Summary Judgment (Docket #16), and Bank of Texas' Motion to Strike Supplemental Affidavit of Richard Huck ("Docket #32") and the Court, being fully advised finds as follows:

This action arises out of certain business transactions which took place between customers of the two financial institutions. State Bank's customer, Ventura Classics, ("Ventura") is a corporation in the business of buying and selling used automobiles.

Ventura is owned by Brian Goss ("Goss"). Bank of Texas' customer is B. Speer & Associates ("Speer"), whose principal is Buzz Speer. Speer is also in the business of buying and selling used automobiles. Ventura and Speer established a business relationship in which they purchased automobiles from and sold automobiles to each other.

The undisputed facts regarding the controversy which arose between the parties are as follows:

1. The parties had a course of dealing out of which payment for the sale of automobiles between them was usually accomplished by means of a documentary draft . Typically, the seller would receive a documentary draft which would be comprised of an envelope containing payment information and appropriate authorizations on the front of the envelope. Inside would be placed the corresponding title documents for the automobile which was being purchased. The seller would then deposit the documentary draft ("draft") with his own bank. Seller's bank would then forward the title documents and draft to the buyer's bank for payment or collection.

2. Once the buyer's bank received the draft, buyer Gross or Speer would come into the bank, verify the draft, determine whether the title documentation was in order, and instruct the bank either to pay the draft, or return the draft unpaid.

3. Occasionally, in the interest of time, if Goss and Speer had agreed to a transaction, Ventura, through Goss, would authorize Speer to sign a draft on behalf of Ventura/Goss. Likewise, Speer would occasionally authorize Goss to sign a draft on

Speer's behalf. This did not occur in the transactions involved in this complain or the counterclaim.

4. In November and December of 1996, Ventura sold five automobiles to Speer. Speer delivered five Bank of Texas drafts to Ventura for each of the automobiles.[1] The five Bank of Texas drafts were issued on the dates and in the amounts set forth as follows:

Date of Draft	Date Credited	Cert. Receipt Date	Amount	Maker	Vehicle
11/13/96	11/13/96	11/18/96	$34,150	Speer	93MB0390
11/08/96	11/14/96	11/18/96	$32,650	Speer	93MB0506
11/15/96	11/15/96	11/18/96	$16,650	Speer	92LX7198
12/10/96	12/11/96	12/12/96	$41,650	Speer	92MB2690
12/11/96	12/12/96	12/16/96	$32,650	Speer	92MB5346

5. Ventura deposited the Bank of Texas drafts with State Bank for collection, accompanied by the proper title documentation executed in favor of Speer.

6. The automobiles represented by the Bank of Texas drafts were actually delivered to Speer by Ventura.

7. State Bank gave Ventura immediate credit for the Bank of Texas drafts in the amount of $157,750.00 and forwarded the drafts and title documentation to Bank of Texas. The drafts were received by Bank of Texas on the dates stated in the table set forth above.

8. Upon receiving the Bank of Texas drafts, Bank of Texas contacted its

[1]Unless otherwise indicated, reference to drafts includes title documentation accompanying the drafts.

customer, Speer, notifying him that the five drafts had been presented by State Bank for collection. Speer came to Bank of Texas and was allowed by the bank officer to physically remove the five original drafts and title documentation. The Bank of Texas allowed Speer to do this based upon execution by Speer of a trust agreement wherein Speer promised to either return the drafts to Bank of Texas for return to State Bank unpaid, or return to Bank of Texas with sufficient funds to pay the drafts. Speer promised to do so within a certain time frame set forth on the lower left hand face of the trust agreement. The date was calculated depending upon the type of draft presented. Most of the drafts were "3 day sight" drafts.

9. Bank of Texas allowed the drafts and title documentation to be removed in order for Speer to take the documents to Metro Imports, Inc., ("Metro") which provided the floor plan financing for Speer's purchases.

10. Customarily, before it paid any presented draft, Bank of Texas required Speer to deposit funds equal to the amount of the draft, which generally came in the form of a draft from Metro. Bank of Texas did not pay any of the five subject drafts when the drafts were presented.

11. Speer returned to Bank of Texas and purchased a cashier's check in the amount of $83,450.00 made payable to State Bank to pay the first three Bank of Texas drafts ("the November Bank of Texas drafts"). Speer kept the original November Bank of Texas drafts and the corresponding title documentation as well as the two December draftsand title documentation.

12. Bank of Texas states that it issued and mailed the cashier's check to State Bank covering the three November drafts in November, 1996.[2] However, State Bank never received the cashier's check and called Bank of Texas inquiring about payment of the November Bank of Texas drafts.

13. On December 26, 1996, Bank of Texas issued a replacement cashier's check #4807848636 in the amount of $83,450 to replace the earlier cashier's check which was apparently lost. When State Bank presented the Bank of Texas cashier's check, it was dishonored and returned stop payment by Bank of Texas. The cashier's check remains unpaid.

14. To date, Bank of Texas has not paid State Bank for the November Bank of Texas drafts nor returned the Bank of Texas drafts unpaid. The corresponding title documentation has also never been returned.

15. Bank of Texas did not refund the $83,450.00 to Speer.

16. Speer never returned the two Bank of Texas drafts dated in December, 1996 or the title documents accompanying them referenced in ¶ 4, herein.

17. To date, Bank of Texas has neither returned the two December Bank of Texas drafts and corresponding title documentation to State Bank nor made any attempt to pay the two December Bank of Texas drafts. Thus, all five drafts remain unpaid.

Undisputed Facts Regarding the Counterclaims

18. From December 5, 1996 to December 11, 1996, State Bank received seven

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[2]No record of this cashier's check appeared in the record.

documentary drafts drawn on Ventura and presented by Bank of Texas to State Bank for payment ("State Bank drafts") along with title documentation. The first five drafts received were as follows by date, amount and notations thereon:[3]

a. November 28, 1996	$17,500	"3 Day Sight"
b. December 2, 1996	12,750	"3 Day"
c. December 2, 1996	16,500	"3 Day"
d. December 5, 1996	22,500	
e. December 5, 1996	18,500	
	$87,750	

Bank of Texas gave immediate credit to Speer's account on each draft and Speer withdrew the funds received for the drafts before the drafts were presented to State Bank for payment or collection.

19. Upon receiving the State Bank drafts, State Bank called its customer, Goss, to come into State Bank, review the State Bank drafts, and instruct State Bank on whether to pay the State Bank drafts or return them to the Bank of Texas unpaid. State Bank was not authorized to pay for incoming drafts drawn on Ventura until and unless Goss authorized payment. Goss did not authorize Speer to make the State Bank drafts in Ventura's name. On review of the drafts, Goss verified his initial response by telephone to State Bank that he did not order, purchase or receive automobiles represented by the State Bank drafts, that he never signed nor authorized anyone else to sign the State Bank drafts, that he did not authorize payment of the State Bank drafts and that State Bank should return them unpaid.

20. State Bank returned the drafts to Bank of Texas on or about December 18,

[3]See undisputed facts number 27 through 30 regarding the two other drafts.

1996. It had received the three drafts containing "3 day" notations on December 5 and/or 9.

21. Thereafter, on December 20, 1996, Bank of Texas resubmitted the State Bank drafts to State Bank along with a handwritten note from Judy Massey ("Massey"), Vice President of Bank of Texas which stated "Dispute of Date of Return" and attached copies of certain UCC provisions. The State Bank drafts and claim of late return arrived for the second time at State Bank on December 24, 1996.

22. In response to the note from Massey, an employee of State Bank, Theres[4] Bray, issued of a cashier's check in the amount of $87,750.00 to pay for certain State Bank drafts. The cashier's check ("State Bank cashier's check") was mailed to Bank of Texas the same day, December 24, 1996.

23. Coy Gallatin, ("Gallatin"), then vice-president of State Bank, was informed of the submission of the State Bank cashier's check on the afternoon of December 24, 1996 and immediately informed another bank employee, Brenda Plowman, to attempt to retrieve the check from the State Bank mail room. The check had already been placed in the United States mail and was irretrievable.

24. On the next business day, December 26, 1996, State Bank sent, via facsimile, a letter to Bank of Texas explaining that the State Bank cashier's check had been mistakenly issued and sent without authorization from the State Bank customer, Ventura, and that the State Bank drafts were not authorized by Ventura or Goss, that there existed

[4]Also referenced in the record as "Teresa"and "Theresa".

a "possibility of fraud", and that a stop payment order was being placed on the State Bank cashier's check.

25. Bank of Texas claims to have received and cashed the State Bank cashier's check prior to receiving the facsimile or any notice of stop payment.

26. To date, Ventura/Goss has not received the automobiles or the properly executed title documentation for the automobiles represented by the State Bank drafts.

27. Bank of Texas received for deposit two additional documentary drafts from Speer, each dated December 11, 1996 in the amounts of $22,500 and $14,300 ("Two drafts"). Bank of Texas also gave immediate credit to Speer's account for the Two drafts.

28. Speer immediately withdrew the funds before Bank of Texas presented the Two drafts to State Bank for payment or collection.

29. Bank of Texas presented the Two drafts to State Bank for payment by Ventura, both of which were marked "3 Day Sight".

30. State Bank did not pay the Two drafts and they were received back from State Bank on December 27, 1996.

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated: "The plain language of Rule 56(c)

mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
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> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir.

1992).

STATE BANK'S MOTION FOR SUMMARY JUDGMENT

The Court concludes State Bank is entitled to summary judgment as to its claims against Bank of Texas. Bank of Texas became liable on the drafts when it released the drafts and title documents to Speer. Pursuant to UCC Section 4-503, Bank of Texas had a duty to deliver the title documents only "on acceptance" or "on payment" by the drawee, Speer.

Acceptance is defined in Section 3-409(a) as "the drawee's signed agreement to pay the draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered". (emphasis added) Section 3-409(b) provides that "[a] draft may be accepted although it has not been signed by the drawer. . .is overdue, or has been dishonored".

Bank of Texas released unaccepted, unpaid drafts to Speer, violating the clear instructions accompanying the drafts and documents of title and its duty to use ordinary care in carrying out those instructions pursuant to UCC Section 3-103(7).[5] The trust agreement by which Bank of Texas sought to protect itself is not recognized in any provision of the UCC, but constituted a private agreement between Bank of Texas and

[5] The duty to use "ordinary care" is defined as "observance of reasonable commercial standards". See UCC Section 3-301(7).

Speer which does not relieve Bank of Texas of its obligations to State Bank and Ventura.[6]

When Speer returned to the Bank of Texas and paid the amount due on the three November drafts, Bank of Texas' release of the November drafts became excused by Speer's payment on these previously unaccepted drafts when, and if, the cashier's check was delivered and paid to State Bank. See UCC Section 4-503.

The fact that Speer provided the funds for the issuance and later reissuance of the cashier's check leads this Court to conclude that Bank of Texas has no right of offset against State Bank as to the cashier's check. The cashier's check does not represent funds advanced by, or claims to which, Bank of Texas is entitled. This conclusion is supported by UCC Section 3-411(c), which enumerates the defenses available for refusal to pay, none of which are present.

In addition to claiming damages pursuant to the UCC, State Bank also seeks damages under a claim for common law conversion pursuant to UCC Section 3-420(a) and Oklahoma Comment 1 thereto. This Court finds that under the facts presented, the release of the drafts and title documents to Speer does constitute conversion for which State Bank is entitled to summary judgment. Additionally, State Bank is entitled to summary judgment as to the retention of the funds paid by Speer for the cashier's check and payment of the November drafts.

The Court has considered First State Bank of Texas' Motion to Strike and finds the

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[6] Nor was it necessary for Speer to be given the drafts and title documentation in order to obtain floor plan financing from Metro. Metro's representative could have come into Bank of Texas to verify the necessary information or the information could have been exchanged between Bank of Texas and Metro directly in a number of ways which would have protected all parties involved.

same to be moot in that the Affidavit of Richard J. Huck did not form a basis for the Court's decision herein.

The Court next addresses State Bank's and Bank of Texas'motions for summary judgment as to the counterclaims asserted by Bank of Texas. Bank of Texas makes two claims in it's counterclaims. First, Bank of Texas asserts that the State Bank cashier's check was improperly dishonored. Second, State Bank improperly refused to pay the additional two State Bank drafts not included in the cashier's check.

The Court has reviewed the authority and arguments of counsel and finds material issues of fact remain as to the counterclaim which preclude summary judgment at this time pursuant to Fed.R.Civ.P. 56. These fact questions include:

1. Who initiated and under what circumstances the seven subject drafts were signed, issued and sent to State Bank if, in fact, the parties do not dispute that Ventura did not order any of the seven vehicles represented by the drafts;

2. When the notice of stop payment was received by the proper person at Bank of Texas and when the cashier's check in the amount of $87,750.00 was "cashed";

3. Why Bank of Texas gave immediate credit on the seven drafts; and

4. What, if any, additional fact issues should be considered in determining the status of the two lending institutions in regard to the documentary drafts, including dates of receipt and return.

Accordingly, both parties motions for summary judgment as to the counterclaim are denied. State Bank's Motion for Summary Judgment as to its complaint is granted as

stated herein. Bank of Texas' Motion to Strike is denied as moot.

The parties are to submit a pretrial order regarding the counterclaim on Tuesday, June 16, 1998. Suggested findings of fact and conclusions of law are also to be submitted at that time with regard to the counterclaim. The parties and out of state counsel are excused from docket call currently scheduled for Monday, June 15, 1998, pursuant to the Joint Motion to Continue Trial Setting filed herein. However, local counsel are to attend docket call on Monday, June 15, 1998 at 9:30 a.m. in order for the Court to schedule the anticipated date for commencement of trial on the trailing docket.

IT IS SO ORDERED.

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARENCE T. THOMPSON and ANNA R. THOMPSON,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 95-C-1112-K

JUDGMENT ON VERDICT

The above matter came before the Court for jury trial on May 21, 1998, the Honorable Terry Kern, District Judge, presiding. Present were the Plaintiff C.T. Thompson, Anna Thompson having previously been excused from appearing; Plaintiffs' attorneys George W. Owens and Randall E. Rose; and the Defendant, the United States of America, appearing by its attorney, Charles P. Hurley. The jury was duly empaneled and sworn. The jury heard the Plaintiffs' evidence. At the conclusion of the Plaintiffs' evidence, the Defendant moved for a directed verdict under Rule 50 of the Federal Rules of Civil Procedure, which was overruled. The jury heard the Defendant's evidence, the charges of the Court, the argument of counsel and returned its verdict in favor of the Plaintiffs, finding that Plaintiffs are entitled to a refund of all additional interest assessed against them under 26 U.S.C. § 6621 (c); the negligence penalty assessed against them under 26 U.S.C. § 6653 (a) and (b); and the overvaluation penalty assessed against them under 26 U.S.C. § 6659 (a).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs have and recover judgment of and from the Defendant for additional interest assessed against them

under 26 U.S.C. § 6621 (c), together with interest at the statutory rate from November 24, 1994, until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs have and recovered judgment of and from the Defendant for the negligence penalty assessed against them under 26 U.S.C. § 6653 (a) and (b), together with interest at the statutory rate from November 24, 1994, until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs have and recover judgment and from the Defendant for the overvaluation penalty assessed against them under 26 U.S.C. § 6659 (a), together with interest at the statutory rate from November 24, 1994, until paid in full.

Terry C. Kern, District Judge

Approved As To Form:

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WEATHERFORD U.S.A., INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 97-CV-1059 K (J)
	)	
WILLIAM H. DAVIS and MANCHESTER PIPELINE CORPORATION,	)	
	)	
Defendants.	)	

ORDER

Upon the parties' Joint Application for Order for Administrative Closure, and for cause shown therein, the Court finds that the Application should be granted.

THEREFORE, IT IS ORDERED that pursuant to Local Civil Rule 41.0 the case be administratively closed, subject to reopening for good cause.

DATE: June 10, 1998

Jerry C. Kern
UNITED STATES DISTRICT JUDGE

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